ROLLAND P. WEDDELL; GRANITE INVESTMENT GROUP, LLC; AND HIGH ROCK HOLDING, LLC, APPELLANTS, *v.* H2O, INC.; MICHAEL B. STEWART, AN INDIVIDUAL AND AS TRUSTEE OF THE MICHAEL B. STEWART TRUST; EMPIRE ENERGY, LLC; EMPIRE GROUP, LLC; EMPIRE FOODS, LLC; EMPIRE FARMS, LLC; ORIENT FARMS, LLC; WHITE PAPER, LLC; EMPIRE GEOTHERMAL POWER, LLC; NEVADA ENERGY PARK, LLC; AMOR II CORPORATION; M.B.S., INC.; TAHOE ROSE, LLC; CLEARWATER RIVER PROPERTIES, LLC; HONALO KAI, LLC; SIERRA ROSE, LLC; SUNDANCE FARMS, LLC; GNV ENTERPRISES, LLC; KOSMOS LEASE HOLDINGS, LLC; GRANITE CREEK LAND & CATTLE, LLC; EMPIRE SEED COMPANY LIMITED PARTNERSHIP; GEOR II CORPORATION; SAN EMIDIO RESOURCES, INC.; SAN EMIDIO AGGREGATE, INC.; AND JUNIPER HILL PARTNERS, LLC, RESPONDENTS.

No. 55200

March 1, 2012 271 P.3d 743

Appeal from a district court judgment following a bench trial in a breach of contract, tort, and declaratory relief action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Following the demise of their relationship, former business associates commenced litigation regarding the ownership of various business projects. After a bench trial, the district court entered judgment for controlling shareholder and member of corporation and limited-liability companies. Minority limited-liability company (LLC) member appealed. The supreme court, CHERRY, J., held that: (1) judgment creditor's charging order only entitled creditor to the debtor member's economic interest in LLC and did not divest debtor member of his managerial rights, (2) charging order triggered involuntary transfer provision in LLC's operating agreement, (3) notice of lis pendens filed to enforce alleged agreement for the purchase of a membership interest in a geothermal LLC was unenforceable, and (4) evidence was sufficient to establish that former business associate of controlling shareholder did not have an ownership interest in corporation's shares.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied April 27, 2012]

[En banc reconsideration denied May 24, 2012]

Day R. Williams, Carson City; *Sisco & Naramore* and *Kenneth D. Sisco*, Norco, California, for Appellants.

Robison, Belaustegui, Sharp & Low and *F. DeArmond Sharp, Keegan G. Low*, and *Kristen L. Martini*, Reno, for Respondents.

1. Appeal and Error.
   A district court's factual findings are given deference on appeal and will be upheld if not clearly erroneous and if supported by substantial evidence.
2. Appeal and Error.
   ''Substantial evidence'' to support factual findings on appeal is evidence that a reasonable mind might accept as adequate to support a conclusion.
3. Appeal and Error.
   Issues involving statutory and contractual interpretation are legal issues subject to de novo review.
4. Corporations and Business Organizations.
   Limited-liability companies are business entities created to provide a corporate-styled liability shield with pass-through tax benefits of a partnership.
5. Corporations and Business Organizations.
   A charging order is a remedy by which a judgment creditor of a limited-liability company member can seek satisfaction by petitioning a court to charge the member's interest with the amount of the judgment. NRS 86.401(1).
6. Corporations and Business Organizations.
   A charging order directs a limited-liability company to make distributions to the creditor that it would have made to the member. NRS 86.401(1).
7. Corporations and Business Organizations.
   A charging order affects only the debtor's membership interest in a limited-liability company (LLC) and does not permit a creditor to reach LLC assets. NRS 86.401(1).
8. Corporations and Business Organizations.
   A charging order gives the charging creditor only limited access to the membership interest of the indebted limited-liability company (LLC) member, and the charging creditor does not unequivocally step into the shoes of an LLC member. NRS 86.401(1).
9. Corporations and Business Organizations.
   Under a charging order, a judgment creditor, or assignee, is only entitled to the judgment debtor's share of the profit and distributions of a limited-liability company (LLC), takes no interest in the LLC's assets, and is not entitled to participate in the management or administration of the business. NRS 86.401(1).
10. Corporations and Business Organizations.
    After the entry of a charging order, the debtor limited-liability company (LLC) member no longer has the right to future LLC distributions to the extent of the charging order, but retains all other rights that it had before the execution of the charging order, including managerial interests. NRS 86.401(1).
11. Corporations and Business Organizations.
    Judgment creditor's charging order only divested debtor member of limited-liability company (LLC) of his economic opportunity to obtain profits and distributions from the LLC, not his managerial rights. NRS 86.401.

12. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Prohibiting a creditor who has a charging order from exercising the management rights of a debtor member in a limited-liability company (LLC) reflects the principle that LLC members should be able to choose those members with whom they associate. NRS 86.401.

13. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Judgment creditor's charging order against debtor member's interest in limited-liability company (LLC) triggered the involuntary transfer provision in LLC's operating agreement, where the provision explicitly included charging orders in its purview. NRS 86.401.

14. LIS PENDENS.
The doctrine of lis pendens provides constructive notice to the world that a dispute involving real property is ongoing. NRS 14.010(3).

15. LIS PENDENS.
Lis pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments; rather, their office is to prevent the transfer or loss of real property that is the subject of dispute in the action that provides the basis for the lis pendens. NRS 14.010(1), (3).

16. LIS PENDENS.
It is fundamental to the filing and recordation of a lis pendens that the action involve some legal interest in the challenged real property. NRS 14.010(1), (3).

17. LIS PENDENS.
The filing of a notice of pendency is limited to actions involving the foreclosure of a mortgage on real property, or affecting the title or possession of real property. NRS 14.010(1), 14.015(2)(a).

18. LIS PENDENS.
Notice of lis pendens, filed by former business associate of the majority member of geothermal limited-liability company (LLC) to enforce alleged agreement allowing former business associate to purchase a membership interest in the LLC, was unenforceable, as the agreement did not involve a direct legal interest in real property. NRS 14.010(1), (3), 14.015(2)(a), 86.351(1).

19. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Evidence was sufficient to establish that former business associate of majority shareholder of corporation did not have an ownership interest in the corporation's shares; there was evidence that, after former business associate purportedly acquired the shares, former business associate assigned the shares to another company that was owned by corporation's majority shareholder.

20. APPEAL AND ERROR.
Assertion on appeal by former business associate of controlling shareholder and member of corporation and limited-liability companies that he, rather than controlling shareholder and member, was entitled to attorney fees, lacked merit in litigation regarding the ownership of various business projects, where former business associate did not provide the supreme court with any cogent argument or persuasive legal authority in support of the assertion.

Before SAITTA, C.J., CHERRY and GIBBONS, JJ.

OPINION

By the Court, CHERRY, J.:

In this appeal, we consider distinct issues arising from a fall-out between business partners. We first consider whether a judgment creditor divests a dual member and manager of a limited-liability company of his managerial duties. In doing so, we determine the rights and remedies of a judgment creditor pursuant to NRS 86.401. We conclude that a judgment creditor has only the rights of an assignee of the member's interest, receiving only a share of the economic interests in a limited-liability company, including profits, losses, and distributions of assets. Therefore, the judgment creditor and holder of a charging order against appellant Rolland P. Weddell's membership interests is simply entitled to Weddell's economic interest in appellant Granite Investment Group, LLC. For this reason, we reverse the district court's judgment relating to the scope of the charging order against Weddell's membership interests and remand this matter to the district court for further proceedings concerning Weddell's managerial interests in Granite.

We next consider whether a party may file a notice of pendency of actions on an option to purchase a membership interest in a limited-liability company. In resolving this issue, we define the scope of NRS 14.010 and conclude that parties should only file a notice of pendency when the action directly involves real property—more specifically, concerning actions for the foreclosure of a mortgage upon real property or actions affecting the title of possession of real property. In the matter before us, we conclude that the notice of pendency filed by Weddell is unenforceable, as the action on which it is based concerned an alleged expectancy in the purchase of a membership interest in respondent Empire Geothermal Power, LLC, and, thus, did not involve a direct legal interest in real property.

Lastly, we consider whether substantial evidence exists to support the district court's finding that Weddell had no ownership interest in respondent H2O, Inc. After meticulously reviewing the record, we conclude that substantial evidence supports the district court's findings that Weddell was merely an agent on behalf of respondent Michael B. Stewart and has never acquired an ownership interest in H2O. Accordingly, we affirm the district court's judgment in all other aspects.

FACTS

Between 2000 and 2007, Stewart and Weddell entered into a business relationship concerning a number of different projects,

ranging from garlic farming to geothermal energy. Several disputes arose among the two parties, ultimately leading to the collapse of their business relationship. Upon the relationship's demise, Weddell filed a complaint asserting numerous claims against Stewart. Stewart also filed a complaint and asserted numerous counterclaims. After a four-day bench trial, the district court found in Stewart's favor on all counts. Weddell, on behalf of himself and his respective companies, filed this appeal. Below, we recapture the pertinent facts surrounding the collapse of Stewart and Weddell's relationship.

Granite Investment Group & High Rock Holding

Stewart and Weddell were both involved in some respect with Granite Investment Group and appellant High Rock Holding, LLC. In December 2004, Weddell was elected manager of Granite. Several months later in May 2005, Stewart and Weddell signed an amended and restated operating agreement (Granite operating agreement).[1]

According to the Granite operating agreement, Stewart received 1.5 votes and Weddell received 1 vote. Several years later, in October 2007, Stewart used his majority voting power to allegedly remove Weddell as manager. Thereafter, Stewart ostensibly elected himself manager of Granite. However, pursuant to section 5.10 of the Granite operating agreement, a manager can only be removed by the unanimous affirmative vote of all of the members. Addi-

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[1]Around the same time, an option agreement was executed, which Weddell argues gave Granite an option to purchase 100 percent of a separate Stewart company owning a geothermal power plant and 20,000 acres of geothermal leases. Later, an April 2006 option agreement was signed by both parties and contains an integration clause. The district court found that the April 2006 option agreement to purchase the geothermal plant is valid, supported by consideration, and is binding upon the parties.

Weddell contends that the district court should have accepted the parties' May 2005 option agreement to purchase the geothermal plant, instead of finding that the April 2006 option agreement was valid, supported by consideration, signed, and binding. He argues that he was preoccupied when he signed the April 2006 agreement and that the May 2005 agreement remains pending under a binding mediation decision. The district court did not err in coming to this conclusion. *See Zhang v. Dist. Ct.*, 120 Nev. 1037, 1041 n.11, 103 P.3d 20, 23 n.11 (2004) (recognizing that a novation is a substitution of a new contract for an old contract, thereby extinguishing the old contract), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008); *see also Campanelli v. Altamira*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (declaring that '' ''when a party to a written contract accepts it [a]s a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations.'' '' '' (quoting *Level Export Corp. v. Wolz, Aiken & Co.*, 111 N.E.2d 218, 221 (N.Y. 1953) (quoting *Metzger v. Aetna Ins. Co.*, 125 N.E. 814, 816 (N.Y. 1920)))).

tionally, section 5.2 does not prohibit more than one manager at a time.

When Weddell was elected manager of the Granite Investment Group, he was also elected manager of High Rock Holding. To reflect the management changes at High Rock, Stewart and Weddell entered into an amended and restated operating agreement whereby Stewart had 1.5 votes and Weddell had 1 vote (High Rock operating agreement). Likewise, in October 2007, Stewart used his superior voting power to remove Weddell as manager of High Rock. While the Granite operating agreement required a unanimous affirmative vote of the members, the similarly numbered section of the High Rock operating agreement only required an affirmative vote of the members.

In October 2008, in an unrelated matter, the district court granted an application by a creditor to charge Weddell's membership interest in Granite and High Rock, among other Weddell entities, for over $6 million. Pursuant to NRS 86.401,[2] the charging order entitled the creditor to any and all disbursements and distributions, including interest, and all other rights of an assignee of the membership interest. Thereafter, Stewart purportedly purchased Weddell's remaining membership interest in Granite for $100 in accordance with section 10.2 of the Granite operating agreement.[3]

The district court concluded that the charging order divested Weddell of *both* membership and managerial rights in Granite and High Rock upon the tender of purchase money made by Stewart.[4] The district court also concluded that Stewart is the sole manager of Granite and High Rock.

Empire Geothermal Power

During the course of the litigation, Weddell filed a notice of lis pendens against Stewart and Empire Geothermal Power, among others, clouding the title to Empire Geothermal's real property. Subsequently, Empire Geothermal filed a motion to cancel the notice of pendency under NRS 14.015, asserting that the underlying

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[2]This statute was revised by the 2011 Legislature. *See* 2011 Nev. Stat., ch. 455, § 69, at 2800-01.

[3]Section 10.2 concerns voluntary transfers without the consent of the other members whereas section 10.4 concerns involuntary transfers, such as charging orders. Both sections would permit Stewart to buy out Weddell's membership interest. Under section 10.2, a transferring member is merely required to sell his or her membership interest for a purchase price of $100. On the other hand, section 10.4 includes an elaborate transferring scheme wherein the company must give written notice to the member and an appraisal must occur within thirty (30) days of the involuntary transfer.

[4]The district court's language concerning the divestiture of both membership and managerial rights is troublesome. It appears that the district court has conflated the purpose of a charging order with the statutory provisions encompassed in the parties' operating agreements.

action was for monetary damages and was not an action to foreclose on or an action affecting the title or possession of real property as mandated by NRS 14.010. In his opposition, Weddell asserted that the action involved real property because he was entitled to 100 percent of the membership interest in Empire Geothermal, including a geothermal power plant and 20,000 acres of geothermal leases.

During a hearing on the motion, the district court focused on the language in Stewart and Weddell's option agreement: ''Granite Investment Group[,] LLC[,] shall purchase from [Stewart] entities their membership interest in Empire Geothermal Power.'' Following the hearing, the district court ordered that the notice of pendency recorded by Weddell be canceled, finding that Weddell's alleged expectancy in the purchase of the membership interest in Empire Geothermal involved personal property interests, not real property interests. The district court found that Weddell failed to establish that his action was for the foreclosure of a mortgage upon real property or that it affected the title or possession of real property as required by NRS 14.015(2)(a).

H2O, Inc.

In the early 1980s, Stewart began farming garlic in Empire, Nevada. Stewart's food-processing company, Empire Foods, LLC, received a loan from a bank in 1999. Shortly thereafter, Empire Foods filed for Chapter 11 bankruptcy due to a decline in the garlic market. Stewart had Weddell, his business associate at the time, negotiate with the bank to reduce the loan. Instead of the bank taking the garlic inventory and the accounts receivable that were the original collateral to the loan, Weddell was able to extinguish nearly half of Stewart's debt.

In exchange for his successful negotiation with the bank, Weddell received a 15-percent interest in High Rock Holding from Stewart. According to Weddell, Stewart also promised him that he would receive $2.5 million in compensation if and when the funds became available. Stewart denies that he made such a promise. The alleged promise of $2.5 million was not memorialized on paper; nor were there any witnesses to the statements between Stewart and Weddell at the time the promise was purportedly made.

Apparently, in May 2004, Stewart gave Weddell a check for $2.5 million, with which Weddell ultimately purchased 100 percent of the stock (10,000 shares) in H2O, Inc. Shortly thereafter, Weddell assigned his alleged interest in H2O to White Paper, LLC, an entity owned and operated by Stewart. In June 2007, Weddell transferred any and all interest that he had in the shares of H2O stock to Stewart. Subsequently, a dispute arose as to whether the $2.5 million used to purchase the H2O stock belonged to Weddell or

Stewart and, thus, whether the stock was purchased for the benefit of Weddell or Stewart. The district court held that Weddell had never acquired an interest in the stock of H2O and was acting merely as Stewart's agent when he purchased the shares. The district court found that the June 2007 transfer would have transferred any interest that Weddell might have had in H2O to Stewart. The district court also found that Stewart was the source of virtually all monies and assets transferred into H2O. The court further found that the business activities between Stewart and Weddell were simply strategic and did not constitute fraud.

DISCUSSION

[Headnotes 1-3]

The issues on appeal require us to review the district court's factual findings, as well as interpret statutory and contractual provisions. ''The district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.'' *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). ''Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.'' *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). Issues involving statutory and contractual interpretation are legal issues subject to our de novo review. *See Canarelli v. Dist. Ct.*, 127 Nev. 808, 813, 265 P.3d 673, 676 (2011) (declaring that ''[w]e review the 'district court's conclusions of law, including statutory interpretations, de novo' '' (quoting *Borger v. Dist. Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004))); *Benchmark Insurance Company v. Sparks*, 127 Nev. 407, 411, 254 P.3d 617, 620 (2011) (providing that '' '[i]nterpretation of a contract is a question of law that we review de novo' '' (quoting *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003))).

Judgment creditor's rights under the charging order

To better understand the preeminent issue, we first review the general nature of limited-liability companies, including the statutory framework pursuant to NRS Chapter 86. Next, we will present a historical overview of the charging order remedy. As part of this overview, we will analyze the rights of judgment creditors in the course of holding a charging order. Finally, we will explain the basis for our conclusion that, under Nevada law, judgment creditors have no right to participate in the management of the limited-liability company and only obtain the rights of an assignee of the member's interest—receiving only a share of the economic interests in a limited-liability company, including profits, losses, and distributions of assets. By limiting a creditor's right to exercise the

debtor member's management rights, we ensure that creditors of a limited-liability company cannot disrupt and interfere with the management rights of other members. This conclusion rests on the uncontested right of a member to choose his or her associates and to encourage investing by enabling limited members to invest money and to share profits, but without risking more than the amount they contributed.

Limited-liability companies

[Headnote 4]

Limited-liability companies (LLCs) are business entities created ''to provide a corporate-styled liability shield with pass-through tax benefits of a partnership.'' *White v. Longley*, 244 P.3d 753, 760 (Mont. 2010); *Gottsacker v. Monnier*, 697 N.W.2d 436, 440 (Wis. 2005) (stating that ''[f]rom the partnership form, the LLC borrows characteristics of informality of organization and operation, internal governance by contract, direct participation by members in the company, and no taxation at the entity level. From the corporate form, the LLC borrows the characteristic of protection of members from investor-level liability.'' (internal citation omitted)); *Elf Atochem N. America, Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999) (LLCs allow ''tax benefits akin to a partnership and limited liability akin to the corporate form''). Originally enacted by Wyoming in 1977, the statutorily based creature of an LLC has expanded to all 50 states and the District of Columbia as a result of a favorable Internal Revenue Service ruling. *White*, 244 P.3d at 760; Keith Paul Bishop & Jeffrey P. Zucker, *Bishop and Zucker on Nevada Corporations and Limited Liability Companies* § 16.1 & n.7 (2011) (listing the states and years of enactment). With a goal of attracting new business to Nevada, the Secretary of State, with the support of the Attorney General, proposed the adoption of ''the LLC'' in 1991 as part of a comprehensive bill, A.B. 655, to streamline the corporate law in this state. Bishop & Zucker, *supra*, § 16.1; *see* Hearing on A.B. 655 Before the Joint Senate and Assembly Judiciary Comms., 66th Leg. (Nev., May 7, 1991). Along with Colorado, Florida, Kansas, and Wyoming, Nevada became the fifth state to enact such groundbreaking corporate legislation. Bishop & Zucker, *supra*, § 16.1 n.7.

Statutory framework for Nevada LLCs

The rules governing the formation and operation of Nevada LLCs are set forth in NRS Chapter 86.[5] Those who wish to enter

[5]It is noteworthy that some sections of Chapter 86 appear to have been borrowed from Nevada's partnership law, NRS Chapter 88. Bishop & Zucker, *supra*, § 16.1 n.11.

into an LLC should be vastly familiar with this chapter in order to properly protect their interests. In considering the question at issue, we focus on the provisions in Chapter 86 that set forth the organization and management of an LLC, as well as the authorization of a charging order remedy for personal creditors of LLC members.

In Nevada, an LLC is formed by signing and filing the articles of organization, together with the applicable filing fees, with the Secretary of State. NRS 86.151; NRS 86.201. An LLC may, but is not required to, adopt an operating agreement, NRS 86.286, which is defined as ''any valid written agreement of the members as to the affairs of a limited-liability company and the conduct of its business.'' NRS 86.101.[6] Unless the articles of organization or operating agreement provide otherwise, management of a limited-liability company is vested in its members in proportion to their contribution to capital. NRS 86.291. A member is ''the owner of a member's interest in a limited-liability company or a noneconomic member.'' NRS 86.081. The term ''[m]ember's interest'' is defined as ''a share of the economic interests in a limited-liability company, including profits, losses and distributions of assets.'' NRS 86.091.

[Headnotes 5-7]

The collection rights and remedies against a member's interest in a limited-liability company are governed by NRS 86.401. This provision recognizes the charging order as a remedy by which a judgment creditor of a member can seek satisfaction by petitioning a court to charge the member's interest with the amount of the judgment. NRS 86.401(1); *see Brant v. Krilich*, 835 N.E.2d. 582, 592 (Ind. Ct. App. 2005) (holding ''that a charging order is the only remedy for a judgment creditor against a member's interest in an LLC,'' after interpreting a similar Indiana statute). A charging order directs the LLC to make distributions to the creditor that it would have made to the member. *See 91st Street v. Goldstein*, 691 A.2d 272, 282 (Md. Ct. Spec. App. 1997). As a result, a charging order affects only the debtor's partnership interest and does not permit a creditor to reach partnership assets.

''Charging orders originated as a statutory solution to cumbersome common law collection procedures 'that were ill-suited for reaching partnership interests.' '' *Green v. Bellerive*, 763 A.2d 252, 256 (Md. Ct. Spec. App. 2000) (quoting *91st Street*, 691

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[6]This statute was amended by the 2011 Legislature. It now defines operating agreement as ''any valid agreement of the members as to the affairs of a limited-liability company and the conduct of its business, whether in any tangible or electronic form.'' *See* 2011 Nev. Stat., ch. 168, § 12, at 779.

A.2d at 275).[7] The charging order concept was first established in the United States in the 1914 Uniform Partnership Act and has since been replicated in some degree in nearly every United States jurisdiction, including Nevada. *91st Street*, 691 A.2d at 275; *see* NRS 86.401; NRS 88.535[8] (NRS Chapter 88 contains Nevada's partnership statutes).

[Headnotes 8-10]

Charging orders have been described as ''nothing more than a legislative means of providing a creditor some means of getting at a debtor's ill-defined interest in a statutory bastard, surnamed 'partnership,' but corporately protecting participants by limiting their liability as . . . corporate shareholders.'' *Bank of Besthesda v. Koch*, 408 A.2d 767, 770 (Md. Ct. Spec. App. 1979). In short, ''[a] charging order gives the charging creditor only limited access to the partnership interest of the indebted partner.'' *Green*, 763 A.2d at 257. Consequently, the judgment creditor does not unequivocally step into the shoes of a limited-liability member. *Id*. at 259. The limited access of a judgment creditor includes ''*only* the rights of an assignee of the member's interest.'' NRS 86.401(1) (emphasis added). A judgment creditor, or assignee, is only entitled to the judgment debtor's share of the profit and distributions, takes no interest in the LLC's assets, and is not entitled to participate in the management or administration of the business. *Dixon v. American Industrial Leasing Co.*, 205 S.E.2d 4, 9 (W. Va. 1974); *see In re Lucas*, 107 B.R. 332, 336 (Bankr. D.N.M. 1989) (stating that ''[a]ny assignee of the [membership] interest merely entitles the assignee to receive the profits to which the [member] would otherwise be entitled''); *Kellis v. Ring*, 155 Cal. Rptr. 297, 299 (Ct. App. 1979) (stating that ''[w]hile [the judgment creditor] has a right to receive the share of the profits or other compensation by way of income, or the return of his contributions to which his assignor would otherwise be entitled, he has no right to interfere in the management of the limited partnership'' (internal quotations omitted)); *Madison Hills Ltd. v. Madison Hills, Inc.*, 644 A.2d 363, 367 (Conn. App. Ct. 1994) (noting that ''a charging creditor does not become a full partner, [and] is not entitled to manage the partnership''); *Olmstead v. F.T.C.*, 44 So. 3d 76, 79 (Fla. 2010) (providing that ''an assignment of a membership in-

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[7]Charging orders were formed by the English Partnership Act of 1890 as a result of an artificial and clumsy procedure whereby the town sheriff went down to the partnership's place of business, seized partnership assets, closed the partnership, infuriated the solvent partners, and caused the judgment creditor to bring an action for an injunction. *City of Arkansas City v. Anderson*, 752 P.2d 673, 681-82 (Kan. 1988); *see* J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 Wash. L. Rev. 1, 3 (1953).

[8]This statute was revised by the 2011 Legislature. *See* 2011 Nev. Stat., ch. 455, § 82, at 2807-08.

terest will not necessarily transfer the associated right to participate in the LLC's management''); *Green*, 763 A.2d at 260 (holding that the fundamental management rights of a partner are not transferred to a judgment creditor by a charging order); *see also* J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 Wash. L. Rev. 1, 13 (1953) (noting that ''a receiver does not become a partner or participate in the management'').[9] After the entry of a charging order, the debtor member no longer has the right to future LLC distributions to the extent of the charging order, but retains all other rights that it had before the execution of the charging order, including managerial interests.

Weddell's membership and managerial interests in Granite

[Headnotes 11, 12]

Here, the charging order levied by Weddell's creditor directed Granite to divert Weddell's rights to LLC profits and distributions to the creditor. The charging order only divested Weddell of his economic opportunity to obtain profits and distributions from Granite—charging only his membership interest, not his managerial rights. *See* NRS 86.401. Prohibiting the creditor from exercising Weddell's management rights reflects the principle that LLC members should be able to choose those members with whom they associate. *Green v. Bellerive*, 763 A.2d 252, 261-62 (Md. Ct. Spec. App. 2000).

[Headnote 13]

We further conclude that the charging order triggered the involuntary transfer provision of the Granite operating agreement, section 10.4. Section 10.4 explicitly included charging orders in its purview. Therefore, we remand this case to the district court to resolve whether Stewart properly complied with section 10.4 and whether, as a result, Weddell was divested of his membership interest in Granite. In light of our conclusion, we direct the district court to determine whether Weddell has retained his managerial interests, and whether Stewart has elected himself co-manager pursuant to sections 5.2 and 5.10 of the Granite operating agreement. We also conclude that the district court did not err in finding that the April 2006 High Rock operating agreement signed by both parties controlled and that, under it, Weddell was voted out as manager of that LLC.

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[9]This rationale is analogous to the rights of a transferee pursuant to NRS 86.351(1):

> [A] transferee of a member's interest has no right to participate in the management of the business and affairs of the company . . . [and] is only entitled to receive the share of profits or other compensation by way of income, and the return of contributions, to which the transferor would otherwise be entitled.

Notice of lis pendens

Weddell argues that the district court improperly canceled his notice of lis pendens because the option agreement to purchase the membership interest and assets of the geothermal company ''affect[ed] . . . possession of real property.'' NRS 14.010(1).

[Headnotes 14-17]

The doctrine of lis pendens provides constructive notice to the world that a dispute involving real property is ongoing. NRS 14.010(3). ''[L]is pendens are not appropriate instruments for use in promoting recoveries in actions for personal or money judgments; rather, their office is to prevent the transfer or loss of real property which is the subject of dispute in the action that provides the basis for the lis pendens.'' *Levinson v. District Court*, 109 Nev. 747, 750, 857 P.2d 18, 20 (1993); *see* NRS 86.351(1) (providing that ''[t]he interest of each member of a limited-liability company is personal property''). ''It is fundamental to the filing and recordation of a *lis pendens* that the action involve some legal interest in the challenged real property.'' *In re Bradshaw*, 315 B.R. 875, 888 (Bankr. D. Nev. 2004). *Cf. BGJ Associates v. Superior Court*, 89 Cal. Rptr. 2d 693, 703 (Ct. App. 1999) (stating that ''an action for money *only*, even if it relates in some way to specific real property, will not support a lis pendens''). Therefore, under Nevada law, the filing of a notice of pendency is limited to actions involving ''the foreclosure of a mortgage upon real property, or affecting the title or possession of real property.'' NRS 14.010(1); NRS 14.015(2)(a); *see Thomas v. Nevans*, 67 Nev. 122, 130, 215 P.2d 244, 247-48 (1950) (providing that ''[t]he doctrine of constructive notice resulting from the filing with the county recorder of a notice of *lis pendens* applies . . . only to actions affecting real property'').

[Headnote 18]

The underlying complaint is not of the type envisioned under NRS 14.010(1) and NRS 14.015(2)(a) because it does not directly involve real property. Instead, Weddell seeks enforcement of an option to purchase the membership interest in the geothermal company, and even though the geothermal company apparently owned real property, membership interest is personal property. *See* NRS 86.351(1) (providing that the interest of each member in an LLC is personal property). Accordingly, the doctrine of lis pendens does not apply, and the district court did not abuse its discretion in canceling the notice of lis pendens. *See Meadow Springs, LLC v. IH Riverdale, LLC*, 690 S.E.2d 842, 845-46 (Ga. 2010).[10]

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[10]The parties' briefs suggest that the real property has been sold. Presuming that the real property associated with the geothermal company has since

Ownership of H2O

[Headnote 19]

Next, we must consider the district court's decision on the merits, including whether substantial evidence supports its finding that Weddell has never acquired an ownership interest in the stock of H2O. According to Weddell, Stewart promised him $2.5 million in compensation for his successful debt negotiation in 2001. Stewart denies that he made such a promise, which was neither memorialized on paper nor witnessed by a third person. A few years later, Stewart gave Weddell $2.5 million, which Weddell then used to purchase 10,000 shares of H2O stock. Both Stewart and Weddell now claim the shares. The district court held that Weddell had never acquired an interest in the stock of H2O and was merely acting as an agent on behalf of Stewart, in part because Stewart was the source of virtually all monies and assets transferred into H2O after Weddell purchased the shares.

Weddell contends that substantial evidence does not support the district court's conclusion that he never obtained ownership interest in H2O. The record demonstrates otherwise. Regardless of whether Weddell ever owned the shares, the record clearly establishes that in May 2004, Weddell assigned his purported H2O shares to another company, White Paper, LLC, which was owned by Stewart, and later validly transferred any and all interest that he had in those shares to Stewart in June 2007. NRS 104.8301 (governing delivery of shares to a third person on behalf of the purchaser). Accordingly, we conclude that Weddell's arguments concerning fraud, estoppel, and waiver are irrelevant or lack merit, *see J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 277, 291, 89 P.3d 1009, 1018 (2004) (declaring that '' '[f]raud is never presumed; it must be clearly and satisfactorily proved' '' (alteration in original) (quoting *Havas v. Alger*, 85 Nev. 627, 631, 461 P.2d 857, 860 (1969))), and there exists substantial evidence supporting the district court's conclusion that Weddell does not enjoy any ownership interest in H2O stock.

CONCLUSION

Pursuant to NRS 86.401, a judgment creditor may obtain the rights of an assignee of the member's interest, receiving only a share of the economic interests in a limited-liability company, including profits, losses, and distributions of assets. Thus, the charging order does not entitle the creditor to Weddell's managerial

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been sold, this issue would be deemed moot. *Lathrop v. Sakatani*, 141 P.3d 480, 486 (Haw. 2006) (providing that ''the sale of the property prevents the appellate court from granting any effective relief'' (citing *Chaney v. Community Development Agency*, 641 N.W.2d 328, 335 (Minn. Ct. App. 2002))).

rights in Granite. Due to the district court's misinterpretation of NRS 86.401, we reverse the district court's judgment in part and remand this matter to the district court for further proceedings consistent with this opinion.

[Headnote 20]

With regard to the other issues on appeal, the district court properly rendered its legal conclusions and substantial evidence supports the district court's findings. For the foregoing reasons, we affirm the district court's judgment in all other aspects.[11]

SAITTA, C.J., and GIBBONS, J., concur.

DONALD LEE BIGPOND, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57558

March 1, 2012 270 P.3d 1244

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence, third offense within seven years. First Judicial District Court, Carson City; James Todd Russell, Judge.

Defendant was convicted by jury in the district court of battery constituting domestic violence, third offense within seven years. Defendant appealed. The supreme court, DOUGLAS, J., held that: (1) evidence of other crimes, wrongs or acts may be admitted under statute governing admissibility of such evidence for a relevant nonpropensity purpose other than those listed in the statute, overruling *Rowbottom v. State*, 105 Nev. 472, 779 P.2d 934 (1989); *Willett v. State*, 94 Nev. 620, 584 P.2d 684 (1978); *Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976); *State v. McFarlin*, 41 Nev. 486, 172 P. 371 (1918), and abrogating *Lindsay v. State*, 87 Nev. 1, 478 P.2d 1022 (1971); *Fairman v. State*, 83 Nev. 137, 425 P.2d 342 (1967); *Nester v. State of Nevada*, 75 Nev. 41, 334 P.2d 524 (1959); and (2) evidence of defendant's prior acts of

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[11]Weddell requests that he be awarded legal fees and costs and that the award of attorney fees in Stewart's favor be reversed. Because Weddell fails to provide this court with any cogent argument or persuasive legal authority in support of this allegation, this argument lacks merit. *See Smith v. Timm*, 96 Nev. 197, 201, 606 P.2d 530, 532 (1980) (stating that the court was unable to find error because the appellant had failed to provide adequate legal authority). Additionally, this court has already dismissed Weddell's appeal concerning the district court's award of attorney fees. *See Weddell v. Stewart*, Docket No. 55981 (Order Dismissing Appeal and Referring Counsel to State Bar, November 12, 2010).

domestic violence on the victim, who was defendant's wife, was admissible.

Affirmed.

Robert B. Walker, Carson City, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Neil A. Rombardo*, District Attorney, and *Mary-Margaret Madden*, Deputy District Attorney, Carson City, for Respondent.

1. Criminal Law.
   The supreme court reviews questions of statutory interpretation de novo.
2. Statutes.
   When interpreting a statutory provision, the supreme court will look first to the plain language of the statute.
3. Statutes.
   The supreme court, when interpreting a statute, must attribute the plain meaning to a statute that is not ambiguous.
4. Criminal Law.
   Evidence of other crimes, wrongs or acts may be admitted under statute governing admissibility of such evidence for a relevant non-propensity purpose other than those listed in the statute, overruling *Rowbottom v. State*, 105 Nev. 472, 779 P.2d 934 (1989); *Willett v. State*, 94 Nev. 620, 584 P.2d 684 (1978); *Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976); *State v. McFarlin*, 41 Nev. 486, 172 P. 371 (1918), and abrogating *Lindsay v. State*, 87 Nev. 1, 478 P.2d 1022 (1971); *Fairman v. State*, 83 Nev. 137, 425 P.2d 342 (1967); *Nester v. State of Nevada*, 75 Nev. 41, 334 P.2d 524 (1959). NRS 48.045(2).
5. Criminal Law.
   A presumption of inadmissibility attaches to all evidence of prior crimes, wrongs or acts. NRS 48.045(2).
6. Criminal Law.
   The use of uncharged evidence of other crimes, wrongs or acts to convict a defendant is heavily disfavored in the criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. NRS 48.045(2).
7. Criminal Law.
   To overcome the presumption of inadmissibility attached to evidence of defendant's other crimes, wrongs or acts, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. NRS 48.045(2).
8. Criminal Law.
   The supreme court reviews the district court's decision as to whether to admit evidence of a person's other crimes, wrongs or acts for a manifest abuse of discretion. NRS 48.045(2).
9. Criminal Law.
   Evidence of defendant's prior acts of domestic violence on the victim, who was defendant's wife, was admissible in prosecution for battery constituting domestic violence, third offense within seven years, pursuant

to statute governing admissibility of other crimes, wrongs or acts, to provide insight into relationship between defendant and victim and victim's possible reason for recanting at trial her prior accusations against defendant, even though evidence was not offered for a purpose listed in the statute, as victim's credibility was a central issue at trial, in that she was the only witness to alleged incident, there was clear and convincing evidence that prior bad acts had occurred, and importance of establishing relationship between defendant and victim outweighed danger of unfair prejudice to defendant. NRS 48.015, 48.045(2).

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we address whether evidence of ''other crimes, wrongs or acts'' may be admitted for a nonpropensity purpose other than those listed in NRS 48.045(2). Appellant Donald Lee Bigpond contends that evidence of prior acts of domestic violence is per se inadmissible under NRS 48.045(2) when it is not offered for a purpose listed in the statute. We disagree.

We hold that evidence of ''other crimes, wrongs or acts'' may be admitted for a nonpropensity purpose other than those listed in NRS 48.045(2). To the extent that our prior opinions indicate that NRS 48.045(2) codifies the broad rule of exclusion adopted in *State v. McFarlin*, 41 Nev. 486, 494, 172 P. 371, 373 (1918), we overrule those opinions. *See, e.g.*, *Rowbottom v. State*, 105 Nev. 472, 485, 779 P.2d 934, 942 (1989), *overruled on other grounds by Jezdik v. State*, 121 Nev. 129, 139 n.34, 110 P.3d 1058, 1065 n.34 (2005); *Willett v. State*, 94 Nev. 620, 622, 584 P.2d 684, 685 (1978); *Theriault v. State*, 92 Nev. 185, 189, 547 P.2d 668, 671 (1976), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995). Consistent with this view of NRS 48.045(2), we clarify the first factor of the test set forth in *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), for determining the admissibility of prior bad act evidence to reflect the narrow limits of the general rule of exclusion and that the prosecution must demonstrate that the evidence is relevant for a nonpropensity purpose.

With respect to this case, we conclude that the district court did not abuse its discretion. The evidence of prior acts of domestic violence involving the victim and defendant were relevant where the victim recanted her pretrial accusations against the defendant because the evidence placed their relationship in context and provided a possible explanation for the recantation, which assisted the jury in evaluating the victim's credibility. The prior acts were proven by clear and convincing evidence, and the district court properly weighed the probative value against the danger of unfair prejudice,

giving an appropriate limiting instruction. Because the evidence was properly admitted, we affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Bigpond was charged with battery constituting domestic violence, third offense within seven years, for striking his wife in the jaw with a closed fist, causing her to fall to the ground and lose consciousness. Before trial, the State filed a motion to admit evidence of prior incidents of domestic violence involving Bigpond and the victim. The State, anticipating that when the victim took the stand at trial she would recant her pretrial statements implicating Bigpond, argued that the evidence was not being offered to show Bigpond's propensity to commit domestic violence but to explain the relationship between Bigpond and the victim and provide a possible explanation for the victim's anticipated recantation. Bigpond argued that the evidence was inadmissible because it was not being offered for a relevant purpose listed in NRS 48.045(2). The district court reserved judgment on the State's motion in limine and indicated that it would make its decision and hold the appropriate hearing if the victim took the stand and recanted her pretrial statements.

During direct examination, the victim recanted her previous statements to law enforcement, paramedics, and an emergency room physician that Bigpond struck her in the jaw with a closed fist and knocked her to the ground. Consistent with its pretrial decision, the district court conducted a hearing outside the presence of the jury pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), and determined that the victim's prior allegations of domestic violence against Bigpond were relevant to explain the relationship between the victim and Bigpond and provide a possible explanation for her recantation, and that the evidence's probative value was not outweighed by the danger of unfair prejudice. The court thus decided to admit the victim's prior allegations and issued a limiting instruction to the jury before allowing the State to reexamine the victim.

Bigpond was convicted of battery constituting domestic violence, third offense within seven years. This appeal followed.

DISCUSSION

Bigpond contends that the district court abused its discretion by admitting evidence of his prior acts of domestic violence for the purpose of explaining the relationship between himself and the victim in order to provide a possible explanation for the victim's recantation during trial. Bigpond argues that admitting evidence for this purpose pursuant to NRS 48.045(2) is precluded by our opinion in *Rowbottom v. State*, 105 Nev. 472, 485, 779 P.2d 934, 942 (1989), *overruled on other grounds by Jezdik v. State*, 121 Nev.

129, 139 n.34, 110 P.3d 1058, 1065 n.34 (2005). In *Rowbottom*, we decided that testimony admitted to show the relationship between the defendant and his family was inadmissible under NRS 48.045(2) because that is not one of the purposes listed in the statute. *Id.* Although dicta, this statement reflects an understanding of Nevada's prior bad act jurisprudence that does not take account of a significant change in the approach to prior bad act evidence that was codified when the Legislature adopted NRS 48.045 in 1971. We now correct this misunderstanding.

Common law

The controversy over uncharged misconduct evidence dates back to the English common law and developed contemporaneously in both England and America. *See* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954 (1933); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988 (1938) [hereinafter Stone, *Similar Fact Evidence: America*]; Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. Cin. L. Rev. 713 (1981). This controversy has coalesced around two divergent views. What Professor Julius Stone referred to as the ''original rule'' reflects a narrow rule of exclusion that excludes uncharged misconduct evidence that is only relevant to prove a defendant's criminal disposition but allows such evidence for any other relevant purpose. *See* Stone, *Similar Fact Evidence: America*, *supra*, at 1004. The alternative view reflects a broad rule of exclusion in which evidence of uncharged misconduct is inadmissible unless it fits within a narrow list of exceptions. *See id.* at 1005.

The broad rule of exclusion, with its narrow list of exceptions, took root in America with the New York Court of Appeals' landmark opinion by Judge Werner in *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901). *See generally* Stone, *Similar Fact Evidence: America*, *supra*, at 1023 (discussing the significance of *Molineux*). After *Molineux*, a majority of jurisdictions adopted Judge Werner's broad exclusionary approach.

This court followed that trend. Citing *Molineux*, we adopted the broad rule of exclusion, with a narrow list of exceptions, in our 1918 decision in *State v. McFarlin*:

> It is the general rule that evidence of the perpetration of distinct crimes from those for which a defendant is being tried will not be considered. There are, however, exceptions to this general rule. In the well-known case of *People v. Molineux*, [61 N.E. 286 (N.Y. 1901),] this question was considered at length, and it was held that, generally speaking, evidence of other crimes might be considered *only* when it tends to establish either (1) motive; (2) intent; (3) absence of mis-

> take or accident; (4) a common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime for which the defendant is being tried. Such is, we think, the correct rule.

41 Nev. 486, 494, 172 P. 371, 373 (1918) (emphasis added). While we later acknowledged in *Nester v. State of Nevada*, 75 Nev. 41, 51, 334 P.2d 524, 529 (1959), that the narrow rule of exclusion, which had been followed in California, was likely the common-law rule, we continued to adhere to the broad rule of exclusion announced in *Molineux*. *See, e.g.*, *Fairman v. State*, 83 Nev. 137, 139, 425 P.2d 342, 343 (1967) (citing *Molineux*); *Lindsay v. State*, 87 Nev. 1, 2-3, 478 P.2d 1022, 1022 (1971) (''Nevada follows the rule of exclusion concerning evidence of other offenses, unless such evidence is relevant to prove the commission of the crime charged with respect to motive, intent, identity, the absence of mistake or accident, or a common scheme or plan.'' (footnotes omitted)).

Codification

The narrow rule of exclusion experienced a resurgence when the Model Code of Evidence and the Uniform Rules of Evidence were adopted in 1942 and 1953. *See* Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 2:29 (2009); 22 Charles Alan Wright et al., *Federal Practice and Procedure* § 5239 (1978). The narrow rule is reflected in the comment by the drafters of Uniform Rule 55 that '' 'the [exceptions] are only exemplary and not exclusive.' '' *See* 22 Wright et al., *supra*, § 5240 (quoting the National Conference of Commissioners on Uniform State Laws, *Handbook* 193 (1953)). These model rules were the precursors to the Federal Rules of Evidence as initially proposed in 1969 and adopted in 1975. During debate on Federal Rule of Evidence 404(b), the House Judiciary Committee specifically rejected an amendment that would have modified the proposed rule to incorporate the broad exclusionary approach, explaining that the rule was ''intended to place 'greater emphasis on (the) admissibility' of uncharged misconduct evidence.'' 1 Imwinkelried, *supra*, § 2:31 (quoting H.R. Rep. No. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7081). Although some federal circuits initially hesitated to interpret Rule 404(b) as a narrow rule of exclusion, all of the federal circuits have now interpreted it in this manner.[1]

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[1]*See, e.g.*, *United States v. Fosher*, 568 F.2d 207, 212 (1st Cir. 1978); *United States v. Benedetto*, 571 F.2d 1246, 1248 (2d Cir. 1978); *United States v. Long*, 574 F.2d 761, 765-66 (3d Cir. 1978); *United States v. Johnson*, 634

In 1971, the Nevada Legislature adopted NRS 48.045(2) based on Draft Federal Rule 404. *See* Legislative Commission of the Legislative Counsel Bureau, A Proposed Evidence Code, Bulletin No. 90 (Nev. 1970) [hereinafter Bulletin No. 90]. As codified, the statute contains almost identical language to Federal Rule of Evidence 404(b).[2] In drafting the Nevada evidence code, the Legislature attempted to follow the proposed federal rules ''as closely as possible,'' deviating only where the federal provisions would have sharply curtailed then-existing Nevada law. *See* Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., February 10, 1971) (statement of evidence code subcommittee Chairman Close); Bulletin No. 90, *supra*.[3]

Statutory interpretation

[Headnotes 1-3]

Whether evidence of ''other crimes, wrongs or acts'' may be admitted for a nonpropensity purpose other than those listed in NRS 48.045(2) is a matter of statutory interpretation. We review questions of statutory interpretation de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When interpreting a statutory provision, this court will look first to the plain language of the statute. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009). ''We must attribute the plain meaning to a statute that is not ambiguous.'' *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

NRS 48.045(2) provides that evidence of ''other crimes, wrongs or acts'' is inadmissible to prove propensity but that it may be admissible ''for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.''[4] The plain language of NRS 48.045(2), like Rule

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F.2d 735, 737 (4th Cir. 1980); *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983); *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985); *United States v. Jordan*, 722 F.2d 353, 356 (7th Cir. 1983); *United States v. Burk*, 912 F.2d 225, 228 (8th Cir. 1990); *United States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976); *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir. 1977); *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989); *United States. v. Burkley*, 591 F.2d 903, 920 (D.C. Cir. 1978).

[2]In 1991, a notice requirement was added to Rule 404(b). The language of the rule was restyled in 2011. Fed. R. Evid. 404 advisory committee's note. These changes have not been incorporated into NRS 48.045.

[3]In codifying the Nevada evidence code, the subcommittee considered three models: (1) National Conference of Commissioners on Uniform State Rules: Uniform Rules of Evidence (1953); (2) California Evidence Code (1965); and (3) Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for United States Courts and Magistrates (1969).

[4]The full text of the provisions is as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in con-

404(b), follows the narrow rule of exclusion. The first sentence of NRS 48.045(2) states a general rule of exclusion that applies only when the evidence is offered to prove (1) ''the character of a person'' and (2) that the person ''acted in conformity therewith.'' *See* 22 Wright et al., *supra*, § 5239. The second sentence then explains that ''evidence of other crimes may be admissible when offered for purposes that fall outside the narrow limits of the general rule.'' *Id.* § 5240. This construction is consistent with the use of the expression ''such as,'' which indicates that the list of ''other purposes'' is illustrative rather than exhaustive.[5] Under this construction, ''the traditional exceptions become simply illustrations of the kinds of use that are not prohibited by the general rule.''[6] *Id.* The plain language of NRS 48.045(2) thus provides that other bad act evidence is inadmissible to prove propensity but is admissible for any other purpose and provides examples of some other purposes.

Despite the plain language of NRS 48.045(2) and the national consensus on the meaning of its federal counterpart, we have been inconsistent in our characterization of the provision. At times, we have continued to apply a broad rule of exclusion by stating that relevant evidence is admissible ''*only* for certain *specified* purposes,'' *Theriault v. State*, 92 Nev. 185, 189, 547 P.2d 668, 671 (1976) (emphases added), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995); *see also Rowbottom*, 105 Nev. at 485, 779 P.2d at 942, and that the broad rule of exclusion ''is codified at NRS 48.045(2),'' *Willett v. State*, 94 Nev. 620, 622, 584 P.2d 684, 685 (1978). In other cases we have used language that more closely mirrors Professor Stone's narrow rule of exclusion and the statutory language:

> It is the general rule that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that the accused committed the charged crime because of a trait of character.

Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 696 (1979); *Shults v. State*, 96 Nev. 742, 748, 616 P.2d 388, 392 (1980) (''But

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formity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[5]*See* NRS 48.105(2) and NRS 48.135(2), which also use ''such as'' to introduce a nonexclusive list.

[6]We note that the list of other purposes contained in NRS 48.045(2) is broader than the five purposes listed in *Molineux* and adopted by this court in *McFarlin*. For example, it contains the entirely new purpose of ''opportunity.'' *See* Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. Cin. L. Rev. 113, 148 (1984) (explaining that the opportunity exception ''does not seem to have appeared in any pre-[404(b)] Rules works by commentators'').

such evidence is admissible if relevant for some purpose other than to show an accused's criminal character and the probability that he committed the crime.''); *see also Braunstein v. State*, 118 Nev. 68, 74, 40 P.3d 413, 417-18 (2002) (explaining that we abandoned our common law approach when the Legislature enacted NRS 48.045(2) into law). And consistent with the narrow rule of exclusion, we have approved of the admission of evidence of uncharged misconduct for nonpropensity purposes other than those listed in NRS 48.045(2). *See, e.g.*, *Domingues v. State*, 112 Nev. 683, 694-95, 917 P.2d 1364, 1372 (1996) (affirming admission of uncharged misconduct evidence for purpose of assessing witness credibility and to explain witness's reason for delay in reporting defendant's confession); *Bradley v. State*, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993) (affirming admission of uncharged misconduct evidence for the purpose of explaining expert opinion); *Roever v. State*, 114 Nev. 867, 873-74, 963 P.2d 503, 506-07 (1998) (Shearing, J., concurring) (use of evidence for impeachment was a permissible '' 'other purpose' '' (quoting *U.S. v. Lara,* 956 F.2d 994, 997 (10th Cir. 1992))); *Braunstein*, 118 Nev. at 74-75 & n.19, 40 P.3d at 418 & n.19 (acknowledging purposes other than those listed in NRS 48.045(2) while concluding that ''propensity for sexual aberration'' is not one of those purposes because it ''sounds much more like the kind of inadmissible, bad character evidence prohibited by NRS 48.045(1)'').

[Headnote 4]

These disparate lines of authority may cause confusion about the scope and meaning of NRS 48.045(2). Therefore, we now clarify that evidence of ''other crimes, wrongs or acts'' may be admitted under NRS 48.045(2) for a relevant nonpropensity purpose other than those listed in the statute. To the extent that our prior caselaw is inconsistent with this holding, it is expressly overruled.

[Headnotes 5-7]

Although we conclude that evidence of ''other crimes, wrongs or acts'' may be admitted for any relevant nonpropensity purpose, we reemphasize that ''[a] presumption of inadmissibility attaches to all prior bad act evidence.'' *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005). ''[T]he use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'' *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001). To ensure that this type of evidence is not misused, we have held that it is admissible only when the trial court determines that (1) the evidence is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger

of unfair prejudice. *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). However, we failed to explain what purposes the evidence must be relevant for. To avoid further confusion, we modify the first factor in *Tinch* to reflect the narrow limits of the general rule of exclusion. In order to overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Application of NRS 48.045(2)

[Headnote 8]

In this case, the district court admitted evidence of prior allegations of domestic violence following a thorough *Petrocelli* hearing and the issuance of an appropriate limiting instruction to the jury. *Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008). We review the district court's decision for a manifest abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

In deciding to admit the evidence, the district court relied on two Hawaii cases which held that when the victim recants pretrial accusations against the defendant, evidence of prior acts of domestic violence involving the same victim and defendant may be admissible ''to show the jury the context of the relationship between the victim and the defendant, where the relationship is offered as a possible explanation for the complaining witness's recantation at trial.'' *State v. Clark*, 926 P.2d 194, 208 (Haw. 1996); *State v. Asuncion*, 129 P.3d 1182, 1195 (Haw. Ct. App. 2006). Hawaii is not alone in permitting evidence of prior acts of domestic violence under similar theories based on evidence provisions similar to NRS 48.045(2). *See, e.g.*, *State v. Magers*, 189 P.3d 126, 133 (Wash. 2008) (''[P]rior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.''); *Com. v. Butler*, 839 N.E.2d 307, 313 (Mass. 2005) (holding that the jury is ''entitled to consider evidence that depicted the hostile relationship between [the victim] and the defendant [in order to help] explain her recantation, so that they could adequately assess her credibility''); *State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999) (admitting evidence under Minn. R. Evid. 404(b) because it served to ''illuminate'' appellant and victim's strained relationship and ''place the incident for which appellant was charged into proper context''); *State v. Sanders*, 716 A.2d 11, 13 (Vt. 1998) (admitting prior history of abuse under Vt. R. Evid. 404(b) ''to put the victim's recantation of prior statements into context for the jury'' in

order to give ''the jury an understanding of why the victim is less than candid in her testimony'' so that they can decide which of the victim's statements is more reliable); *State v. Frost*, 577 A.2d 1282, 1291 (N.J. Super. Ct. App. Div. 1990) (admitting evidence of prior domestic abuse in order to prove the victim's state of mind in order to explain why victim stayed with defendant).

[Headnote 9]

Here, the victim's credibility was clearly a central issue at trial because she was the only witness to the alleged incident. An emergency room physician, paramedic, and police officer all testified that the victim told them that Bigpond punched her in the jaw with a closed fist and she fell to the ground. However, during trial the victim recanted and claimed that her husband never punched her and she just made up the story because she was mad at him. Like the above cases, the victim's prior accusations of domestic violence were relevant because they provide insight into the relationship and the victim's possible reason for recanting her prior accusations, which would assist the jury in adequately assessing the victim's credibility. *See* NRS 48.015 (explaining that to be relevant, the evidence must concern a ''fact . . . of consequence to the determination of the action''). The first *Tinch* factor is satisfied because the victim's prior accusations against Bigpond were relevant and were not admitted in order to show Bigpond's propensity to commit domestic violence but to provide a possible explanation for why the victim recanted her previous statements made to law enforcement and medical personnel.

The second *Tinch* factor is also satisfied. There was clear and convincing evidence that the alleged prior bad acts occurred. Bigpond previously pleaded guilty to punching the victim with a closed fist on July 16, 2009, and grabbing the victim by the hair, slapping her, and pushing her to the ground on November 1, 2009.

Finally, the district court carefully weighed the probative value of the evidence against the danger of unfair prejudice, concluding that the probative value was not substantially outweighed by the danger of unfair prejudice as required by the final *Tinch* factor. During the *Petrocelli* hearing, the district court recognized that the admission of the victim's prior allegations of domestic violence would prejudice Bigpond but concluded that the importance of establishing the relationship between Bigpond and the victim outweighed the danger of unfair prejudice. To minimize that prejudice, the district court restricted the victim's testimony to her prior accusations and did not admit the prior convictions. Furthermore, prior to the admission of the evidence, the district court issued a

limiting instruction explaining that the evidence was only ''being allowed to provide [the jury] with a context of the relationship between the witness and the defendant and to give [the jury] a possible explanation for the witness's differing testimony in court at this time.''

We conclude that the district court did not abuse its discretion because it adequately assessed the three *Tinch* factors outside the presence of the jury, *see Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006), and gave an appropriate limiting instruction before admission of the evidence explaining the limited purpose for which the evidence was admitted, *see Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008). ''In reaching this conclusion, however, we caution the State that our decision is dependent upon the particular facts of this case and the use of prior act evidence . . . pursuant to NRS 48.045(2) should always be approached with circumspection.'' *Ledbetter*, 122 Nev. at 264, 129 P.3d at 679-80.

We affirm the judgment of conviction.

HARDESTY and PARRAGUIRRE, JJ., concur.

JANET WHEBLE, P.A.-C; AND JANET WHEBLE, P.A.-C, LTD., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE, RESPONDENTS, AND ROBERT ANSARA, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ANDREW PEDRETTI; KAREN GRZEDA, INDIVIDUALLY; ALOK CHANDRA SAXENA, M.D., INDIVIDUALLY; VEGAS VALLEY PRIMARY CARE, A NEVADA CORPORATION; AND ALOK C. SAXENA, M.D., CHARTERED, A NEVADA CORPORATION, REAL PARTIES IN INTEREST.

No. 58774

March 1, 2012 272 P.3d 134

Original petition for writ of mandamus challenging district court orders denying petitioners' motions to dismiss and for summary judgment in a medical malpractice matter.

Defendants in medical malpractice action petitioned for writ of mandamus challenging district court orders denying their motions to dismiss and for summary judgment. The supreme court held that as a matter of first impression, action that was filed without a

supporting medical expert affidavit was never commenced within limitations period and was void ab initio.

Petition granted.

Lewis Brisbois Bisgaard & Smith LLP and *S. Brent Vogel* and *Erin E. Dart*, Las Vegas, for Petitioners.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *Katherine L. Turpen*, Las Vegas, for Real Parties in Interest Alok Chandra Saxena, M.D.; Alok C. Saxena, M.D., Chartered; and Vegas Valley Primary Care.

Nursing Home Justice Center and *Terry A. Coffing, Micah S. Echols*, and *Jamie A. Frost*, Las Vegas, for Real Parties in Interest Robert Ansara and Karen Grzeda.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. APPEAL AND ERROR; MANDAMUS.
   Statutory interpretation is a question of law that the supreme court reviews de novo, even in the context of a writ petition.
3. STATUTES.
   When a statute is clear on its face, the supreme court will not look beyond the statute's plain language.
4. HEALTH; LIMITATION OF ACTIONS; MANDAMUS.
   Medical malpractice action that was filed without a supporting medical expert affidavit was never ''commenced'' within limitations period, was void ab initio, and thus, writ of mandamus was warranted to compel district court to dismiss the action. NRS 11.500(1), 34.160, 41A.071; NRCP 3.
5. HEALTH.
   A medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect; it does not legally exist. NRS 41A.071.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

Per Curiam:

In this petition for extraordinary writ relief, we must determine whether the district court can apply NRS 11.500, Nevada's ''savings statute,'' to save otherwise time-barred medical malpractice claims that have been previously dismissed for failure to comply with the affidavit requirements of NRS 41A.071. We conclude that NRS 11.500 does not save medical malpractice claims dismissed

for failure to comply with NRS 41A.071 because these claims are void, and NRS 11.500 applies only to actions that have been ''commenced.'' Thus, writ relief is appropriate here.

FACTS AND PROCEDURAL HISTORY

On November 22, 2006, real parties in interest Robert Ansara, as Special Administrator of the Estate of Andrew Pedretti, and Karen Grzeda (plaintiffs) filed a complaint in district court against Alok Chandra Saxena, M.D.; Vegas Valley Primary Care; Alok C. Saxena, M.D., Chartered; Janet Wheble, P.A.-C; and Janet Wheble, P.A.-C, Ltd. (defendants).[1] Plaintiffs' complaint alleged claims for medical negligence, wrongful death, and statutory abuse and neglect against defendants, a physician and physician's assistant, arising from the care of Andrew Pedretti while he was a patient at the Desert Lane Care Center. The complaint referenced an expert affidavit, as required by NRS 41A.071, but no affidavit was attached. An errata to the complaint, attaching the expert affidavit, was filed on November 27, 2006.

On July 20, 2009, defendants moved for summary judgment, arguing that plaintiffs' failure to attach an expert affidavit to their initial complaint rendered the entire complaint void ab initio as to the medical malpractice claims under *Washoe Medical Center v. District Court*, 122 Nev. 1298, 148 P.3d 790 (2006). The district court denied defendants' motion, and the defendants subsequently filed a petition for writ of mandamus in this court. This court granted defendants' petition, finding that the district court manifestly abused its discretion in not granting summary judgment in defendants' favor on plaintiffs' medical malpractice claims, as the district court was required to dismiss the medical malpractice claims without prejudice due to the failure to attach the expert affidavit. *See Saxena v. District Court*, Docket No. 54775 (Order Granting in Part Petition for Writ of Mandamus, January 8, 2010).

Plaintiffs filed a new complaint on January 21, 2010, reasserting the dismissed medical malpractice claims, and the district court consolidated the two cases. The Saxena defendants filed a motion to dismiss, arguing that the statute of limitations passed for plaintiffs' medical malpractice claims before the January 2010 complaint was filed, and that the claims could not be refiled after the statute of limitations under the savings clause in NRS 11.500. The district court denied the motion. The Wheble defendants then filed a motion for summary judgment asking the district court to find NRS 11.500 unconstitutional, which the district court also denied. The Wheble defendants then filed this writ for mandamus relief.

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[1]Because only some of the defendants below brought this petition, for clarity we will refer to the parties as plaintiffs and defendants.

DISCUSSION

[Headnote 1]

The Wheble defendants argue that extraordinary writ relief is appropriate because the district court was required to grant their motion to dismiss plaintiffs' January 21, 2010, medical malpractice action as untimely. '' 'A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.' '' *Williams v. Dist. Ct.*, 127 Nev. 518, 524, 262 P.3d 360, 364 (2011) (quoting *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted)); *see also* NRS 34.160. A writ of mandamus will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; *see also Williams*, 127 Nev. at 524, 262 P.3d at 364.

This writ proceeding involves an issue of first impression—whether medical malpractice claims previously dismissed for failure to comply with NRS 41A.071 can be refiled under NRS 11.500 after the expiration of the statute of limitations. As there is potential for the district courts to inconsistently interpret this legal issue, we elect to exercise our discretion to entertain the merits of this writ petition and clarify this issue of law.

[Headnotes 2, 3]

''Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition.'' *International Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. When a statute is clear on its face, we will not look beyond the statute's plain language. *Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). Plaintiffs argue that because this court's January 8, 2010, order directed the district court to enter an order dismissing their medical malpractice claims without prejudice, the plain language of NRS 11.500(1) allowed them to refile their claims within 90 days of dismissal, even though the statute of limitations for the claims had passed.

[Headnotes 4, 5]

NRS 11.500(1) states:

> Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:
>
> (a) The applicable period of limitations; or
>
> (b) Ninety days after the action is dismissed,
>
> whichever is later.

By the plain language of the statute, an action must have been ''commenced'' in order for it to be refiled under NRS 11.500(1) after the statute of limitations for the claim has passed. NRCP 3 states that ''[a] civil action is commenced by filing a complaint with the court.'' As this court held in *Washoe Medical Center*, ''a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect. Because a complaint that does not comply with NRS 41A.071 is void ab initio, it does not legally exist . . . .'' 122 Nev. at 1304, 148 P.3d at 794 (footnote omitted).

Here, because the plaintiffs' complaint was dismissed for failure to comply with NRS 41A.071, the complaint never legally existed, and because the complaint never existed, the action was never ''commenced'' as defined by NRCP 3. NRS 11.500(1) does not apply to actions dismissed for failure to comply with NRS 41A.071, therefore, the district court must dismiss the plaintiffs' January 21, 2010, complaint as it was brought beyond the expiration of the statute of limitations for the plaintiffs' claims.

CONCLUSION

Where medical malpractice claims have been dismissed for failure to comply with the affidavit requirement of NRS 41A.071, NRS 11.500(1) cannot be used to refile the same claims beyond the statute of limitations. A medical malpractice complaint filed without the required affidavit is void ab initio and never legally existed; therefore, the dismissed action was never ''commenced,'' as is required for NRS 11.500(1) to apply. Thus, the district court was required to dismiss the plaintiffs' January 21, 2010, complaint reasserting claims previously dismissed for failure to comply with NRS 41A.071 because the statute of limitations for the claims had expired.[2]

Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to dismiss plaintiffs' January 21, 2010, complaint.

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[2]Because we have concluded that NRS 11.500 does not apply to the plaintiffs' claims, we do not need to address the Wheble defendants' other arguments.

BEAU MAESTAS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 48295

BEAU S. MAESTAS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54080

March 29, 2012 275 P.3d 74

Consolidated appeals from a judgment of conviction of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and burglary while in the possession of a deadly weapon and an order denying a motion for new trial in a death penalty case. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Defendant was convicted pursuant to guilty plea in the district court of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and burglary while in the possession of a deadly weapon, and a jury sentenced him to death. Defendant appealed. The supreme court, CHERRY, J., held that: (1) statute affording district court discretion to choose between imposing life-without-parole sentence and impaneling new jury to determine sentence did not violate Eighth Amendment; (2) defendant failed to establish that jury foreperson intentionally concealed any bias against him; and (3) death sentence was not excessive.

Affirmed.

Patti, Sgro & Lewis and *Anthony P. Sgro* and *Erick M. Ferran*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent.

1. SENTENCING AND PUNISHMENT.

Provision of statute affording district court discretion to choose between imposing life-without-parole sentence and impaneling new jury to determine sentence, when jury is unable to reach unanimous penalty verdict in case in which death penalty is sought, did not violate Eighth Amendment; statute did not authorize court to find defendant death eligible or impose death sentence and that determination was made by newly impaneled jury, which also had option to impose lesser sentence, and new jury's discretion was guided by requirements that it find statutory aggravating circumstance, consider mitigating circumstances, and weigh circumstances. U.S. CONST. amend. 8; NRS 175.556.

2. CRIMINAL LAW.
   The supreme court reviews the district court's decision to deny motion for new trial for abuse of discretion, and absent clear error, the supreme court will not disturb the district court's findings of fact.
3. CRIMINAL LAW.
   To obtain a new trial based on juror misconduct, the defendant must establish that: (1) misconduct occurred, and (2) the misconduct was prejudicial.
4. SENTENCING AND PUNISHMENT.
   Comments about sentencing, made by jury foreperson during death penalty hearing, involved her personal opinions and were based on her life experience and general knowledge, rather than specific information from an outside source and, thus, were not juror misconduct in prosecution for capital murder.
5. CRIMINAL LAW.
   Juror's opinion based on life experience, general knowledge, and specialized knowledge or expertise is not extrinsic information and does not constitute juror misconduct.
6. CRIMINAL LAW; JURY.
   Juror misconduct includes lying during voir dire and making a decision on the basis of bias.
7. JURY.
   When it is claimed that a juror has answered falsely on voir dire about a matter of potential bias or prejudice, the critical question is whether the juror intentionally concealed bias.
8. JURY.
   Determination of whether juror intentionally concealed bias during voir dire is left to the district court's sound discretion.
9. CRIMINAL LAW.
   Murder defendant failed to establish that jury foreperson intentionally concealed any bias against him in capital sentencing proceeding, and thus, the district court did not abuse its discretion by denying motion for a new trial; voir dire questions posed to foreperson relating to bias or fairness were perfunctory and vague and did not address her job as emergency dispatcher or its potential effect on her consideration of the case, and comments attributed to her, which, if made, were made during deliberations after full development of evidence, did not indicate that she lied when answering nonspecific questions about bias and impartiality.
10. INDICTMENT AND INFORMATION.
    Federal constitution did not require that aggravating circumstances and balancing of aggravating and mitigating circumstances, considered in death penalty hearing, be alleged in charging document in state prosecution.
11. SENTENCING AND PUNISHMENT.
    Notice-of-intent procedure to seek the death penalty was not a charging document and therefore did not charge a separate offense; notice of intent provided notice of aggravating circumstances that State alleged and facts supporting them.
12. SENTENCING AND PUNISHMENT.
    State was not required to demonstrate good cause to file the amended notice of intent to seek death penalty; State did not allege any additional aggravating circumstances in amended notice of intent, but rather, amended notice to provide additional factual allegations to support ag-

gravating circumstances that were alleged in original notice of intent. SCR 250(4)(d).

13. CRIMINAL LAW.
The supreme court will not disturb a district court's determination of whether a defendant invoked his right to remain silent if that decision is supported by substantial evidence. U.S. CONST. amend. 5.

14. CRIMINAL LAW.
Defendant's statement about remaining silent was equivocal, and thus, he did not invoke protections of *Miranda*; defendant initially indicated that he wanted to invoke his right to remain silent but in the same breath admitted that he alone committed crimes, and when asked again if he wished to discuss crimes, defendant equivocated but then proceeded to make incriminating statements. U.S. CONST. amend. 5.

15. CRIMINAL LAW.
Murder defendant's argument, raised for first time on appeal, that confiscation of letter he wrote while in custody violated his First Amendment rights and was not justified by a legitimate penal interest, was not amenable to plain-error review; error was not so unmistakable that it revealed itself by a casual inspection of record and was not clear under current law. U.S. CONST. amend. 1.

16. CRIMINAL LAW.
A prosecutor's improper comments during a capital penalty hearing are prejudicial when they so infect the proceedings with unfairness as to make the results of the proceeding a denial of due process; prosecutor's alleged improper statements should be considered in context. U.S. CONST. amend. 14.

17. SENTENCING AND PUNISHMENT.
Prosecutor's error in improperly suggesting that defendant's true reason for pleading guilty to murder was to avoid a lengthy trial that would reveal details of crime was harmless, considering brevity of comment in lengthy closing argument and overwhelming evidence supporting death sentence.

18. SENTENCING AND PUNISHMENT.
Death sentence was not imposed under the influence of prejudice, passion, or any arbitrary factor; special verdict reflected deliberate and thoughtful jury, as one or more jurors found nine mitigating circumstances related to defendant's troubled childhood, his lack of a prior criminal record, his admission of guilt, and his remorse. NRS 177.055(2).

19. SENTENCING AND PUNISHMENT.
When considering whether the death sentence is excessive, the supreme court asks whether the crime and defendant before the court on appeal are of the class or kind that warrants the imposition of death. NRS 177.055(2).

20. HOMICIDE; SENTENCING AND PUNISHMENT.
Death sentence imposed on defendant convicted of first-degree murder was not excessive; defendant got knife and drove to trailer park bent on getting revenge for being duped out of $125 in drug deal with victim's mother, defendant knew that girls were alone in trailer and returned to trailer with his sister and used subterfuge to gain entry into trailer, and defendant then stabbed to death a defenseless three-year-old child, cleaned up, disposed of murder weapon and his bloody clothing, and fled state. NRS 177.055(2).

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

Appellant Beau Maestas pleaded guilty to several charges and a jury sentenced him to death for first-degree murder. He subsequently sought a new penalty trial based on allegations of juror misconduct and bias, but the district court denied the motion. In these consolidated appeals, Maestas challenges the judgment of conviction and the order denying the motion for a new trial. We conclude that none of Maestas' claims warrant relief and therefore affirm the judgment and order.

In this opinion, we focus principally on two of Maestas' claims. First, we consider whether NRS 175.556 violates the Eighth Amendment because it allows the district court unfettered discretion to choose between imposing a life-without-parole sentence and impaneling a new jury to determine the sentence when a jury is unable to reach a unanimous penalty verdict. We conclude that NRS 175.556 does not violate the Eighth Amendment because the relevant jurisprudence focuses on whether a capital sentencing scheme sufficiently channels the sentencer's discretion to impose a death sentence and NRS 175.556 does not afford the district court the discretion to impose a death sentence (that determination is left to the new jury, guided by the requirements set forth in NRS 175.554). Second, we consider whether the jury foreperson committed misconduct by expressing her views on the meaning of a life sentence without the possibility of parole based on her special knowledge as a 9-1-1 dispatcher and by lying during voir dire to conceal a bias against Maestas. We hold that the district court did not abuse its discretion by denying the motion for a new trial because no misconduct or bias was proved.

FACTS AND PROCEDURAL HISTORY

This case involves an attack on two children in a trailer located in the CasaBlanca RV Park in Mesquite, Nevada, resulting in the death of one victim and permanent physical injuries to the other victim. In the early morning hours of January 22, 2003, Officer Bradley Swanson responded to a gruesome scene. Outside the trailer, Officer Swanson found three-year-old Kristyanna Cowan lying in her grandmother's arms. Kristyanna had sustained numerous stab wounds, including a wound to the left side of her head that penetrated midway through her brain, wounds to the right side of her head and left side of her neck that penetrated the jugular vein and caused significant blood loss, and a gaping wound to her back. Although still alive, Kristyanna was unconscious and nonresponsive. Swanson found Kristyanna's 10-year-old sister Brittany Bergeron inside the trailer. She had suffered at least 20 stab

wounds but was still conscious and able to tell Swanson what had happened.

Brittany told Swanson that a male and female in their early 20s had come to the trailer. The male grabbed the girls and put his hand over their mouths. Brittany attempted to fight back by kicking and biting, but the male was too strong and everything ''went black.''

The girls were transported to the hospital. Kristyanna died a short time later. Brittany survived the attack but was left a paraplegic as the result of a stab wound that cut through her vertebral column, severing her spine.

Information received at the crime scene indicated that the girls' attackers had some connection to a known drug dealer named Desiree Towne. Towne informed the police that several hours before the attacks, Beau Maestas contacted her to arrange a purchase of methamphetamine. When Towne was unable to secure the drugs from her source, Maestas inquired about two individuals who drove a white Firebird with a yellow bumper. Towne determined that Maestas was referring to Tammy Bergeron (Brittany and Kristyanna's mother) and her husband Robert Schmidt. Maestas and Towne found Bergeron and Schmidt at a casino in Mesquite, and Maestas purchased what he believed to be methamphetamine from Bergeron for $125. The substance turned out to be salt. Upon discovering this deception, Maestas and Towne returned to the casino, where Maestas and Schmidt got into an altercation and were escorted from the premises. Based on this and other information, the police issued an attempt-to-locate broadcast to authorities in Arizona, California, Utah, and Nevada. Maestas was apprehended in Utah, along with his sister Monique[1] and his girlfriend, Sabrina Bantam.

Bantam provided a detailed account of the events before and after the attacks that implicated Maestas and Monique. According to Bantam, Maestas and Monique arrived at her home after Maestas' botched drug purchase. They were livid over the counterfeit drugs purchased from Bergeron. Maestas asked Bantam for a knife, which she gave to him.[2] Bantam then accompanied Maestas and Monique to the CasaBlanca RV Park. Maestas parked in the employee parking lot and instructed Bantam to honk the car horn if she saw a white Firebird (Bergeron's vehicle). Maestas exited the car and walked toward the RV Park, leaving Bantam and Monique in the car.

When Maestas returned to the car approximately 10 minutes later, he was upset, complaining that the little girls would not let

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[1]Brittany identified Monique in a photographic lineup as the female attacker.

[2]Bantam claimed that she believed he needed the knife to cut drugs.

him into the trailer. Monique became angry and accompanied Maestas back to the trailer to assist him in gaining entry. Again, Bantam was instructed to honk the car horn if a white Firebird appeared.

Maestas and Monique returned to the car approximately 10 to 15 minutes later. Maestas' hands and clothing were covered in blood. Bantam drove Maestas and Monique to their grandmother's house to clean up and get their grandmother's car. During the drive, both siblings made incriminating statements. Monique stated that she tried to stab the little girl in the organs and kept stabbing. She said, ''I should have sliced the girl's neck then, because I was too scared. I couldn't do it.'' Maestas commented that he ''stabbed the little girl in the head.'' Maestas, Monique, and Bantam eventually fled to Utah.

Physical evidence also connected Maestas and Monique to the attack. With information obtained from Bantam, police located Maestas' and Monique's bloody clothing and the knives. Blood from both victims was found on the clothing.

Maestas incriminated himself. He told police that he went to Bergeron's trailer to get his money back and perhaps to retaliate against Schmidt by ''maybe cut[ting] him or stab[bing] him or whatever,'' but when he made his way into the trailer, Brittany and Kristyanna began screaming, so he stabbed them. He made similar admissions in a letter to someone named Amy, written while he was incarcerated awaiting extradition to Nevada. In that letter, which was intercepted by jail personnel in Utah, Maestas explained the botched drug deal and admitted that he ''fliped [sic] out and killed the lady's youngest daughter and paralized [sic] the older one.'' In a letter he later wrote to Monique while incarcerated at the Clark County Detention Center, Maestas admitted to ''slaughtering those little pigies [sic],'' referring to Brittany and Kristyanna, and asked Monique to ''knock [Bantam]'s teeth out, kick her lips off, rip her tongue out and wipe your ass with it'' when Monique was released from prison.

The charges and trial

The State charged Maestas with first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and burglary while in possession of a deadly weapon. The State also filed a notice of intent to seek the death penalty, alleging two aggravating circumstances: (1) the murder occurred in the commission of a burglary and (2) the victim was under 14 years of age. After Maestas pleaded guilty to all of the charges, the case proceeded before a jury to determine the sentence to be imposed for the first-degree-murder charge as required by NRS 175.552(1)(b). When the jury was unable to reach a verdict, the

district court declared a mistrial and impaneled a second jury as authorized by NRS 175.556(1).

At the second penalty hearing, the State proceeded on a single aggravating circumstance—Kristyanna's age. The State also presented ''other matter evidence,'' NRS 175.552(3), including the facts and circumstances of the crime and the impact on Brittany of her physical and psychological injuries and the loss of her sister. Regarding the latter, Brittany's foster mother, Judith Himel, testified that when Brittany came to live with her about three years before the trial, Brittany was very apprehensive, needed quite a bit of assistance, and was in a great deal of pain. During the day, Brittany was generally happy, playing with other children, swimming, and going to school. But at night, she was frightened and had difficulty sleeping. She often required a sedative and insisted on having a light and a television on. On Kristyanna's birthday and the date of her death, Brittany releases balloons. Himel testified that Brittany receives counseling and physical therapy. She also related that Brittany is an A/B student, on the honor roll, is active in sports, and is about to enter high school.

In mitigation, Maestas presented six witnesses, including family members, his former school probation officer, and a psychologist, and several letters from relatives and friends. The mitigation case focused on Maestas' youth (he was 19 at the time of the attack), abusive and dysfunctional childhood and relationship with his parents (especially his mother), character and exposure to illegal substances, cognitive functioning, admission of guilt, and remorse.

Maestas' oldest sister, Misty, provided the most compelling testimony concerning Maestas' troubled childhood. Misty related that their father, Harry Maestas, was in prison for murdering several people but apparently received periodic furloughs on the weekends. Misty described Harry as violent and threatening. He physically and emotionally abused Misty and her siblings. For example, when Harry was home on furlough he would wake the children up at 3 or 4 a.m. to conduct ''closet checks.'' If the children's clothes were not hung or folded properly or their shoelaces were not tucked in their shoes, he would beat them. Harry beat Maestas when he was three years old because Maestas could not tie his shoes. According to Misty, their mother, Marilyn Maestas, was an equally bad parent. When Misty and her siblings were young, Marilyn sold drugs, even taking a job as a truck driver to facilitate her drug dealing. Marilyn physically and emotionally abused Maestas. She encouraged Maestas' use of drugs at an early age—he started using marijuana when he was 7 years old—and allowed him to consume hard liquor at the age of 10. Marilyn was present when Maestas started using methamphetamine at age 13. Marilyn was emotionally abusive to Maestas, constantly belittling him and calling him horrible and degrading names. When Maestas returned

home after running away, Marilyn beat him. Marilyn and Harry never displayed any affection toward the children.

Misty described Maestas as a hyperactive child, who was angry and confused by the way their parents treated him. She related positive aspects of Maestas' life: he held a variety of jobs, was very active in sports, and was CPR trained and certified. Finally, Misty testified that she loved her brother very much and that she would maintain a relationship with him if he received a life sentence.

Maestas' stepmother, Linda Maestas, and his stepbrothers, Christopher and Kevin Buckner, testified about the adverse affect that Marilyn had on her son's life, which they witnessed when Maestas would stay with them. At the beginning of Maestas' visits, he was troubled, disobedient, and preoccupied, but in time he relaxed and ''would get into school, into sports, and spend time at home watching movies, playing games,'' acted like a ''normal kid,'' and adjusted well to being in a family. Maestas' disposition would change, becoming sad and withdrawn, when he received telephone calls from Marilyn demanding that he return to her.

Maestas' stepmother and stepbrothers also testified to his good character and their relationships with him. Kevin described Maestas as ''always looking out for people,'' including his family. Linda described Maestas as a ''sweet boy'' who wanted to please people. She also related that she loved Maestas very much and that she was shocked to hear about his crimes, as Maestas had never displayed violence when he lived with her.

Maestas' toxic relationship with his mother was further illustrated through the testimony of his former school probation officer, Ana Archuleta, who was assigned to Maestas at a high school that he attended in Utah. On their first visit to her office, Archuleta observed that Marilyn and Maestas had a very ''volatile relationship.'' Marilyn was very angry and aggressive and called Maestas derogatory names. Although Archuleta recommended that Marilyn participate in counseling with Maestas, she refused. While under Archuleta's supervision, Maestas was respectful to her and raised his grades. However, in December 2000, Maestas violated his probation by not returning home one night and he was arrested. Marilyn refused to allow Maestas to reside with her, and he was placed with his grandmother in Mesquite, Nevada. Other than seeing Maestas at a court appearance the year before his murder trial, Archuleta had no contact with Maestas after he went to live with his grandmother.

Letters from relatives and friends expressed shock over the crimes, stating that Maestas' actions were out of character for him and that drugs must have influenced his actions. He was described in the letters as polite, respectful, helpful, and friendly.

Psychologist David Schmidt testified to Maestas' cognitive functioning. He opined that Maestas exhibited impaired fluid reason-

ing, which is the capacity to gather information and solve problems. Dr. Schmidt explained that fluid reasoning lessens impulsivity as a person matures and allows a person to understand the consequences of actions and stop impulsive responses. Dr. Schmidt explained that although he supports the death penalty in some cases, he did not here because Maestas was functioning at a level well below his age at the time of the offenses.[3] Dr. Schmidt also opined that Maestas was remorseful for his actions and suggested that Maestas' letters referring to ''slaughtering those pigies [sic]'' and asking Monique to harm Bantam could be attributed to posturing and bravado.

Maestas made a statement in allocution. He conveyed his remorse, apologized to his and the victims' families, and expressed his horror at his actions.

The jury found that the single aggravating circumstance—Kristyanna's age—had been proven beyond a reasonable doubt. One or more jurors also found several mitigating circumstances: (1) no significant history of prior criminal activity, (2) extreme emotional and physical abuse during childhood, (3) emotional abandonment by parents, (4) lack of any significant positive male role model during childhood, (5) exposure to criminal activity throughout childhood, (6) exposure to illegal and harmful substances throughout childhood, (7) extremely dysfunctional nuclear family, (8) admission of guilt, and (9) expression of remorse.[4] The jury then unanimously found that the ''aggravating circumstance outweighs any mitigating circumstance or circumstances''[5] and sentenced Maestas to death.[6] He appealed from the judgment of conviction.

The motion for new trial

While that appeal was pending, one of the jurors, Rachel Poore, approached defense counsel because she was having second

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[3]Dr. Schmidt evaluated Maestas at age 22 and determined that he had the fluid reasoning of a 10-year-old child. According to Dr. Schmidt, Maestas' fluid reasoning at the time of the crimes (when he was 19) would have been either the same or worse.

[4]Notably, no juror found his age to be a mitigating circumstance.

[5]We note that the quoted language from the verdict form misstates the weighing calculus set forth in statute. *See* NRS 175.554(3) (providing that jury must determine whether there are mitigating circumstances ''sufficient to outweigh the aggravating circumstance or circumstances found''); *see also* NRS 175.554(4). As we recently observed in *Nunnery v. State*, this misstatement is of no consequence in most cases and, in any event, the ''error inures to the defendant's benefit.'' 127 Nev. 749, 776-77 & n.14, 263 P.3d 235, 253-54 & n.14 (2011).

[6]Maestas was sentenced to three terms of 40 to 180 months in prison for the other charges.

thoughts about her verdict and wanted to help Maestas. As a result of that contact, Maestas filed a motion for a new trial based on juror misconduct. The motion relied on Poore's affidavit regarding comments made by jury foreperson Tina Ransom. Poore claimed that Ransom told jurors that (1) she had learned about the sentencing of Nevada inmates through her experience as an emergency dispatcher, (2) Maestas would be released after serving only a few years in prison if he was sentenced to life without the possibility of parole and that she ''had seen this happen on numerous occasions'' and the parole board would undoubtedly release Maestas, and (3) she personally knew of individuals who had been sentenced to life without the possibility of parole who were ''walking the streets with ankle bracelets.'' The State opposed the motion. The district court conducted an evidentiary hearing. Ten jurors, including Poore and Ransom, testified during the hearing, and an eleventh juror provided a voluntary statement but did not testify. The district court also considered voluntary statements taken by a defense investigator from several of the jurors who testified.

Poore's testimony retreated significantly from her affidavit. She denied two points in the affidavit: (1) that Ransom told the jury that she had special knowledge about sentencing based on her employment and (2) that Ransom suggested that the parole board would undoubtedly release Maestas if he were sentenced to life in prison without the possibility of parole. She also testified that Ransom never commented on what might happen to Maestas if he got a life-without-parole sentence. Poore maintained, however, that Ransom told jurors that she knew of individuals who had received life-without-parole sentences and were released to the streets with ankle bracelets. According to Poore, that general comment was made after the jury's initial nonunanimous vote in favor of the death penalty and a lengthy discussion of mitigation matters that occurred before the jury reached its unanimous verdict. Related to her motivations in contacting defense counsel, Poore acknowledged that the case had consumed her life and she was in counseling because of it. She explained that she wanted to undo her verdict and that she signed the affidavit, which was drafted by Maestas' counsel, to help Maestas. She also admitted that she wrote letters to Maestas shortly after the trial, asking him for forgiveness and indicating that she wanted to get a tattoo of his name.

Ransom denied Poore's allegations. She testified that she never told jurors that she: (1) had special knowledge about sentencing matters based on her job, (2) knew individuals who had received life-without-parole sentences and were released into society with ankle bracelets, or (3) believed Maestas would be released by the parole board if he received a life-without-parole sentence. Ransom testified that she did mention having once read a news story about a man who was awaiting trial and had an ankle bracelet on.

The remaining nine jurors who testified or provided statements gave conflicting accounts. Contradicting the testimony from Poore and Ransom, four jurors (Barker, Morris, Miller, and Schonbrun) recalled that Ransom indicated that she knew about sentencing based on her employment, but only one of them indicated she said that she had ''special'' knowledge about sentencing and that juror (Barker) contradicted herself on that point. Five other jurors (Colmenares, Stone, Clark, Misch, and Torge) agreed with Poore and Ransom on this point, indicating that they recalled no comments about Ransom having knowledge about sentencing (special or otherwise) based on her employment. The majority of the jurors indicated, consistent with Poore's and Ransom's testimony, that Ransom did not suggest that she had any knowledge about what would happen to Maestas if he received a life-without-parole sentence, but one juror (Morris) testified that Ransom said that Maestas ''could be out wearing an ankle bracelet'' if he got a life-without-parole sentence, another juror (Barker) understood a comment by Ransom to be implying that the parole board would release Maestas if he got a life sentence even though Ransom did not mention any specific individual,[7] and a third juror (Misch) recalled a general discussion about whether the parole board would release Maestas if he got a life-without-parole sentence but she could not attribute the discussion to any specific juror(s). Although four jurors (Poore, Barker, Morris, and Colmenares) testified that Ransom made generalized comments that she knew of people who had been sentenced to life without parole and been released with an ankle bracelet, several other jurors (Stone, Clark, Misch, Miller, and Torge) could not attribute those comments to Ransom or had no recollection of any such comments, and one juror (Schonbrun) remembered Ransom making a comment about ankle bracelets but could not recall whether it was in the context of life-without-parole sentences.

The jurors who remembered any relevant comments by Ransom generally agreed that the comments occurred during a discussion in which each juror expressed his or her sentiments about the appropriate sentence. That discussion occurred after an initial vote in which a majority of the jurors favored the death penalty. The comments were relatively brief and were made between 20 and 60 minutes before the unanimous vote.

The district court denied the motion for a new trial. Faced with the conflicting testimony and statements, the district court made a number of credibility determinations and factual findings in a

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[7]This testimony about what the juror understood Ransom to have meant is arguably inadmissible under NRS 50.065(2), as it appears to reflect the juror's subjective understanding of what Ransom said rather than overt facts that are open to sight and hearing.

written order denying the motion.[8] The district court found that Poore's affidavit and testimony were not credible for three reasons: (1) Poore admitted that much of the affidavit prepared by defense counsel was inaccurate, (2) Poore had an emotional attachment to Maestas, and (3) Poore ''admitted [her] desire to undue [sic] the death sentence to make peace with her religious beliefs.'' The court then made the following findings regarding the allegations in Poore's affidavit: (1) Ransom commented on her general knowledge about sentencing of the type any juror would have from life experience but she never used the term ''special knowledge''; (2) considering the conflicting testimony, there was insufficient evidence that Ransom indicated she had special knowledge of sentencing of inmates in Nevada based on her experience as an emergency dispatcher; (3) Ransom did not suggest that she had any special knowledge about Maestas or the case beyond what was presented in court; (4) the allegation that Ransom commented that Maestas would serve only a few years in prison and then be released to society if sentenced to life without parole was untrue and ''any remark about what might happen to Maestas in the future was purely hypothetical speculation, not a factual statement, and that it is inadmissible for any purpose under NRS 50.065''; (5) the allegation that Ransom stated that she had seen numerous people with life-without-parole sentences released after serving only a few years in prison was untrue and that ''Ransom only made a statement that she had seen or heard of people who received life sentences being released and that no specific information beyond that statement was conveyed to the jury''; (6) Ransom did not state that the parole board would release Maestas and any remarks about the meaning of life-without-parole were vague, were not factual statements as they involved hypothetical speculation, and were inadmissible under NRS 50.065 as evidence of the jury's thought process; and (7) Ransom testified credibly that she did not state that she personally knew of people who had been sentenced to life without parole and had been released to the streets with ankle bracelets; rather, she recounted having read a newspaper story about a man awaiting trial for a murder who was at home with an ankle bracelet and other stories she had heard about people who had received life sentences, been released, and then committed other crimes. On the last point the district court specifically found

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[8]The district court struck portions of the voluntary statements and testimony that addressed any juror's thought processes or reactions. *See* NRS 50.065(2) (providing that upon inquiry into the validity of a verdict, ''[a] juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith,'' and that an affidavit or evidence ''of any statement by a juror indicating an effect of this kind is inadmissible for any purpose'').

that Ransom was credible and the jurors who testified otherwise were not credible.

Based on its findings, the district court concluded that Maestas had not demonstrated voir dire misconduct, bias, or consideration of improper information during deliberations. As to voir dire, the court concluded that Maestas failed to prove that Ransom lied during voir dire about her ability to be fair and impartial and there was no basis for a finding of implied or actual bias. The district court further concluded that the comments made by Ransom were based on life experience and did not constitute extrinsic information; therefore, there was no juror misconduct. And even assuming there was misconduct, the district court further concluded that there was no reasonable probability that it affected the verdict because: (1) the State did not argue extensively that Maestas posed a future danger and instead focused on the cold-blooded attack on two young children to avenge a drug deal that had gone bad, the brutality of the attack, Maestas' attitude and lack of remorse, and the planning involved in the attack; (2) the challenged comments did not involve extrinsic information; (3) the jury carefully considered mitigating evidence; and (4) the alleged misconduct does not involve the weighing of the aggravating and mitigating circumstances. Maestas timely appealed from the district court's order.

DISCUSSION

As a result of Maestas' guilty plea, the issues in these consolidated appeals are focused entirely on the capital penalty proceedings and the jury's decision to impose a death sentence for the murder charge, not on Maestas' guilt. We start by addressing the constitutional challenge to the statute (NRS 175.556) that allowed the district court to choose between imposing a life-without-parole sentence and impaneling a new jury after the initial jury could not reach a unanimous verdict. We then turn to the issues related to the motion for a new trial. And finally, we address Maestas' remaining claims and our mandatory review of the death sentence under NRS 177.055(2). We conclude that there were no errors that would warrant a new penalty hearing and therefore affirm the judgment of conviction and order denying the motion for a new trial.

Constitutionality of NRS 175.556

[Headnote 1]

NRS 175.556(1) affords the district court discretion to choose between imposing a life-without-parole sentence and impaneling a new jury to determine the sentence when the jury is unable to reach a unanimous penalty verdict in a case in which the death penalty is sought. Here, the district court elected to impanel a new

jury after the initial jury was unable to reach a unanimous penalty verdict. Maestas argues that the statute violates the Eighth Amendment because it allows the district court unfettered discretion to impose a sentence less than death or expose the defendant to another penalty hearing with the possibility of a death sentence. We disagree.

Maestas relies primarily on the general proposition in the Supreme Court's death-penalty jurisprudence that capital sentencing schemes must channel the sentencer's discretion so that it cannot ''wantonly and freakishly impose the death sentence.'' *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (plurality opinion) (discussing ''basic concern of *Furman* [*v. Georgia*, 408 U.S. 238 (1972),]'' that death penalty was being applied capriciously and arbitrarily); *see also Godfrey v. Georgia*, 446 U.S 420, 428 (1980) (plurality opinion) (holding that states must avoid ''the arbitrary and capricious infliction of the death penalty'' by ''defin[ing] the crimes for which death may be the sentence in a way that obviates standardless [sentencing] discretion,'' channeling ''the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death'' (internal quotations and footnotes omitted)). NRS 175.556(1) does not violate this proscription. By giving the district court the discretion to choose to impanel a new jury to determine the sentence, the statute does not authorize the district court to find a defendant death eligible or impose a death sentence; that determination is made by the newly impaneled jury, which also has the option to impose sentences less than death or life without parole, including sentences of life with the possibility of parole after 20 years or a definite term of 50 years with parole eligibility after 20 years, *see* NRS 200.030(4) (providing sentences for first-degree murder).[9] And the new jury's discretion is guided by the requirements that it find at least one statutory aggravating circumstance, consider mitigating circumstances, and weigh those aggravating and mitigating circumstances, NRS 200.030(4)(a); NRS 200.033; NRS 175.554(2)-(4), consistent with constitutional principles requiring capital sentencing schemes to appropriately channel the sentencer's discretion to avoid imposing death in an arbitrary or capricious manner. *See Gregg*, 428 U.S. at 206-07 (concluding that statutory system similar to Nevada's does not violate the Eighth Amendment). We conclude that NRS 175.556(1) is not constitutionally infirm under the Eighth Amendment; therefore, no relief is warranted in this regard.

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[9]While the death penalty is no longer a risk if the district court chooses to impose a life-without-parole sentence under NRS 175.556(1), the defendant also loses the chance at a sentence that is more favorable than life without parole.

Motion for a new trial

[Headnote 2]

Maestas sought a new trial based on (1) alleged improper comments about extrinsic information made by the jury foreperson during deliberations and (2) the jury foreperson's alleged concealment of bias during voir dire. He argues that the district court erred in denying the motion on its merits.[10] We review the district court's decision for an abuse of discretion, and ''[a]bsent clear error,'' we will not disturb the district court's findings of fact. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003); *see also Valdez v. State*, 124 Nev. 1172, 1186, 196 P.3d 465, 475 (2008).

[Headnote 3]

As we have explained, '' '[j]uror misconduct' falls into two categories: (1) conduct by jurors contrary to their instructions or oaths, and (2) attempts by third parties to influence the jury process.'' *Meyer*, 119 Nev. at 561, 80 P.3d at 453. The allegations in this case—considering information not admitted during trial and lying during voir dire to conceal bias—fall within the first category. *See id.* To obtain a new trial based on juror misconduct, the defendant must establish that (1) misconduct occurred and (2) the misconduct was prejudicial. *Id.* at 563-64, 80 P.3d at 455.

Consideration of extraneous information

[Headnotes 4, 5]

Maestas asserts that the jury foreperson tainted the jury deliberations with extraneous information by telling the jury that she had special knowledge about matters related to sentencing. There are two problems with Maestas' argument. First, the district court

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[10]Maestas also argues that the district court erred in striking portions of the juror statements and testimony under NRS 50.065(2), which provides that a juror is precluded from testifying ''concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict'' or ''concerning the juror's mental processes in connection therewith.'' Having carefully reviewed those portions of the jurors' statements and testimony that were struck, we conclude that Maestas is not entitled to relief. Most of the information was properly struck under NRS 50.065(2). *Meyer v. State*, 119 Nev. 554, 563, 80 P.3d 447, 454 (2003) (''Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken.''). The few instances in which the district court may have erred did not prejudice Maestas because the information was not particularly relevant (jurors' statements reciting the four possible sentences the jury could impose) or the jurors were allowed to testify to the same information and the testimony was not struck (Juror Morris' statement that she recalled Ransom stating that Maestas could be released from prison wearing an ankle bracelet if sentenced to life without parole and Juror Misch's statement that she did not recall Ransom stating that Maestas could be released from prison in a few years if sentenced to life without parole but did recall some discussion amongst the jurors along those lines).

considered the conflicting testimony and found that the foreperson did not suggest that she had special knowledge about sentencing in general or about Maestas in particular based on her employment but instead made comments that were based on general knowledge and life experience. The record does not reveal any clear error in those findings (even the juror whose affidavit provided the basis for the motion below testified consistent with those findings). Second, we have indicated that a juror's opinion based on life experience, general knowledge, and specialized knowledge or expertise is not extrinsic information and does not constitute juror misconduct.[11] *Meyer*, 119 Nev. at 570-71 & n.54, 80 P.3d at 459 & n.54 (''The opinion, even if based upon information not admitted into evidence, is not extrinsic evidence and does not constitute juror misconduct.''). The juror may not, however, relate ''specific information from an outside source, such as quoting from a treatise, textbook, research results, etc.'' *Id.* at 571, 80 P.3d at 459. Again, the district court found that the foreperson's comments involved her personal opinions and were based on her life experience and general knowledge rather than specific information from an outside source.[12] The district court's determination that Maestas had not demonstrated that the jury considered extraneous information is supported by the record and consistent with our prior decisions in this area.

Maestas spends little time on the possibility of intrinsic misconduct, which on its face may be the more troubling aspect of the allegations: that the foreperson told jurors that she was aware of people who had been sentenced to life without parole but were later released with ankle bracelets. Such comments could suggest

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[11]Maestas suggests that in some circumstances, information conveyed to a jury based on a juror's special knowledge may result in the consideration of improper extraneous information. He discusses our decision in *State v. Thacker*, 95 Nev. 500, 596 P.2d 508 (1979), as an example. *Thacker*, however, is distinguishable. That case involved a charge of grand larceny of two calves. *Id.* at 501, 596 P.2d at 508. Although a key fact at issue in the case was the calves' size when they were seized and impounded (the defendants were claiming that the calves that had been seized from them were not the stolen calves), no evidence about the calves' weight or what they had been fed was presented during the trial. *Id.* at 502, 596 P.2d at 509. When the question of the calves' weight and age arose during deliberations, a juror who had been employed at the ranch where the cattle were impounded used his special knowledge to estimate the calves' weight at the time they were impounded, and he conveyed that information to the jury. *Id.* We held that the juror provided unsworn testimony on a disputed fact that was relevant to the determination of the issue before the jury. *Id.* Unlike the juror in *Thacker*, the foreperson in this case did not use specialized knowledge to provide the jury with evidence that was not presented at trial to determine a disputed fact.

[12]To the extent that the foreperson conveyed information that she learned from a news story, it was knowledge she obtained long before the trial and did not involve this case.

that the jury did not follow the court's instructions regarding the meaning of a life-without-parole sentence. This could constitute an improper discussion among jurors that would fall into the realm of intrinsic misconduct.[13] *See Meyer*, 119 Nev. at 562, 80 P.3d at 454 (''[I]ntra-jury or intrinsic influences involve improper discussions among jurors (such as considering a defendant's failure to testify), intimidation or harassment of one juror by another, or other similar situations . . . .''). The district court, however, found that the foreperson testified credibly that she made a comment about a person who had been released with an ankle bracelet while awaiting trial, but that she did not make any statements about people who had been sentenced to life without parole and then been released with an ankle bracelet. How other jurors interpreted her comments and the impact that the comments or the jurors' interpretation of those comments had on the jurors' thought processes are not admissible. NRS 50.065(2). Given the conflicting testimony, the district court's credibility determinations, and the evidentiary limitations imposed by NRS 50.065(2), there was no proof of intrinsic misconduct.

Juror bias

[Headnotes 6-8]

Juror misconduct also includes lying during voir dire and making a decision on the basis of bias. *Meyer*, 119 Nev. at 561, 80

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[13]We have observed that intrinsic misconduct is difficult to prove because of the restriction on juror affidavits or testimony ''that delve into the jury's deliberative process.'' *Meyer*, 119 Nev. at 565, 80 P.3d at 456. Here, to the extent that the relevant testimony as to what was said during deliberations addressed ''overt conduct without regard to the state of mind and mental processes of any juror,'' it was not subject to NRS 50.065(2). *Id.* at 563, 80 P.3d at 454. In this, we note a difference between NRS 50.065(2) and its federal counterpart: Federal Rule of Evidence 606(b) precludes a juror from testifying ''about any statement made or incident that occurred during the jury's deliberations'' with an exception for testimony about ''extraneous prejudicial information'' or ''outside influence.'' NRS 50.065(2) does not include the prohibition against juror testimony ''about any statement made or incident that occurred during the jury's deliberations.'' The Nevada statute is based on the 1969 Preliminary Draft of Rule 606, *Barker v. State*, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979); 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6071, at 452-53 & n.74 (2007) (identifying Nevada as one of two states that adopted the version of subdivision (b) employed in the Preliminary Draft), which was rejected in Congress because it was too expansive, *Tanner v. United States*, 483 U.S. 107, 123-25 (1987); 27 Wright & Gold, *supra*, § 6074, at 488 (''Under that approach [endorsed by the drafters of the Preliminary Draft], jurors are prohibited only from testifying as to their mental processes while testimony may be received as to objectively apparent facts or events occurring during deliberations, such as juror statements or conduct.''). *See Lamb v. State*, 127 Nev. 26, 44 n.10, 251 P.3d 700, 712 n.10 (2011) (noting that ''although NRS 50.065 differs from FRE 606(b) in its phrasing, *Meyer* . . . does not consider the differences significant'').

P.3d at 453. ''[W]here it is claimed that a juror has answered falsely on voir dire about a matter of potential bias or prejudice,'' the critical question is whether the juror intentionally concealed bias. *Lopez v. State*, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989); *Walker v. State*, 95 Nev. 321, 323, 594 P.2d 710, 711 (1979). And that determination is left to the trial court's sound discretion. *Lopez*, 105 Nev. at 89, 769 P.2d at 1290; *Walker*, 95 Nev. at 323, 594 P.2d at 711; *see McNally v. Walkowski*, 85 Nev. 696, 701, 462 P.2d 1016, 1019 (1969) (juror's intentional concealment of material fact relating to his or her qualification to be fair and impartial may require granting of new trial).

[Headnote 9]

Maestas argues that the jury foreperson concealed a bias against him: she represented during voir dire that she could be fair and consider all sentencing options but in fact did not do so during deliberations, as evidenced by her comments and her alleged disregard of the district court's instruction regarding the meaning of life without parole. The district court found that the jury foreperson had not lied during voir dire about her ability to be impartial and follow instructions, to consider all forms of punishment, and to disregard media coverage about the case, and that nothing in her alleged comments during deliberations indicated that she concealed any pretrial determination regarding sentencing or otherwise harbored any bias against Maestas. The district court's findings on this matter are supported by the evidence, *see Isbell v. State*, 97 Nev. 222, 227, 626 P.2d 1274, 1277 (1981), and we similarly are not persuaded that any of the foreperson's alleged comments during deliberations illustrate that she lied or concealed any bias during voir dire. The voir dire questions posed to the foreperson relating to bias or fairness were perfunctory and vague and did not address her job or its potential effect on her consideration of the case. We are not convinced that the comments attributed to her, which, if made, were made during deliberations after the full development of the evidence, indicate that she lied when answering nonspecific questions about bias and impartiality, which were posed in a vacuum with little reference to any factual underpinnings of the case. Because Maestas failed to show that the jury foreperson intentionally concealed any bias against him, we conclude that the district court did not abuse its discretion by denying the motion for a new trial based on this ground.

Remaining claims

Maestas' remaining claims challenge the death sentence based on alleged problems with the charging document and notice of intent to seek the death penalty, the admissibility of evidence pre-

sented during the penalty trial, alleged prosecutorial misconduct, and cumulative error.[14] We conclude that none of these claims warrants relief from the judgment of conviction.

Challenge to the information

[Headnote 10]

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), Maestas argues that the information violates the federal constitution because it did not allege that the aggravating circumstance outweighs the mitigating circumstances and the aggravating circumstance was not subject to a probable-cause determination. Although the effect of these Supreme Court decisions is that the aggravating circumstances used to increase the punishment for murder beyond the statutory maximum absent the aggravating circumstances must be submitted to a jury and proved beyond a reasonable doubt, *Apprendi*, 530 U.S. at 490; *Ring*, 536 U.S. at 609, those decisions were based on the Sixth Amendment right to a jury trial and did not address the question of including the same facts in an indictment, *Ring*, 536 U.S. at 598 n.4; *Apprendi*, 530 U.S. at 477 n.3. And although the Court has indicated that in federal prosecutions, facts that must be submitted to a jury under *Apprendi* also must be charged in the indictment, *United States v. Cotton*, 535 U.S. 625, 627 (2002), that requirement stems from the Fifth Amendment right to ''presentment or indictment of a Grand Jury,'' which applies only to the

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[14]Maestas also raises four arguments that we have rejected in prior cases. First, he urges us to overrule prior decisions holding that neither the Confrontation Clause nor *Crawford v. Washington*, 541 U.S. 36 (2004), apply to evidence admitted at a capital penalty hearing, *see Thomas v. State*, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006); *Johnson v. State*, 122 Nev. 1344, 1353, 148 P.3d 767, 773 (2006); *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). We decline to do so. In a related argument, Maestas criticizes Nevada's death penalty scheme because it does not require bifurcation of the eligibility and selection determinations in death penalty hearings, although trial courts are not precluded from doing so. We have refused to require bifurcated penalty hearings, *see Johnson v. State*, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011); *see also McConnell v. State*, 120 Nev. 1043, 1061-62, 102 P.3d 606, 619 (2004), and Maestas raises no novel arguments justifying a fresh look at this matter. Next, Maestas argues that the district court erred by denying his motion to argue last. We rejected a similar argument in *Witter v. State*, 112 Nev. 908, 922-23, 921 P.2d 886, 896 (1996), and Maestas provides no legitimate basis to depart from *Witter*. *See also* NRS 175.141(5) (requiring prosecution to open and conclude argument). Finally, Maestas challenges the death penalty as cruel and unusual punishment under the Eighth Amendment. We have resoundingly rejected that argument, *see Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001), *abrogated on other grounds by Nunnery*, 127 Nev. at 776 n.12, 263 P.3d at 253 n.12; *Colwell v. State*, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996); *Shuman v. State*, 94 Nev. 265, 269, 578 P.2d 1183, 1186 (1978), and we do so again here.

federal government and has not been incorporated into the Due Process Clause of the Fourteenth Amendment. *See Apprendi*, 530 U.S. at 477 n.3; *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). Nothing in *Apprendi* and *Ring* altered the long-standing rule that the Fifth Amendment indictment provision does not apply to state prosecutions.[15] Accordingly, we reject Maestas' argument that the federal constitution requires that aggravating circumstances and the balancing of aggravating and mitigating circumstances be alleged in the charging document in a state prosecution.[16] Because the aggravating circumstances are not required to be pleaded in the charging document, it naturally follows that they are not subject to a probable-cause determination.

Challenges to the notice of intent

Maestas argues that the notice of intent to seek the death penalty violated the constitution on three grounds: (1) the notice-of-intent procedures precluded challenges based on duplicity, multiplicity, and fatal variance; (2) the initial notice of intent did not allege the elements of capital murder; and (3) the amended notice of intent was untimely. We conclude that these arguments lack merit.

[Headnote 11]

Contrary to Maestas' argument, the notice-of-intent procedure does not result in charges for two separate offenses in one count or one offense in two separate counts: capital murder (based on the notice of intent) and non-capital first-degree murder (based on the information). The notice of intent is not a charging document and therefore does not charge a separate offense; rather, it provides notice of the aggravating circumstances that the State alleges and the facts supporting them. The notice of intent and the charging document (either an indictment or information) serve different purposes, and together they do not charge separate offenses in a single count or one offense in several counts.

The notice of intent also was not deficient based on its omission of the weighing of aggravating and mitigating circumstances.

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[15]Other courts have reached the same conclusion. *E.g.*, *McKaney v. Foreman*, 100 P.3d 18, 20-21 (Ariz. 2004); *Terrell v. State*, 572 S.E.2d 595, 602-03 (Ga. 2002); *People v. McClain*, 799 N.E.2d 322, 335-36 (Ill. App. Ct. 2003); *State v. Hunt*, 582 S.E.2d 593, 602-04 (N.C. 2003); *State v. Laney*, 627 S.E.2d 726, 732 (S.C. 2006).

[16]Such a charging requirement with respect to the balancing of aggravating and mitigating circumstances would place an awkward and unworkable burden on the State at the charging stage given that it generally is the defendant who presents mitigating circumstances, *see Gallego v. State*, 101 Nev. 782, 790, 711 P.2d 856, 862 (1985), and even when the defendant chooses to present no mitigating circumstances, the jury may consider any evidence presented at trial that may mitigate the crime and warrant a sentence less than death, *see Hollaway v. State*, 116 Nev. 732, 743-44, 6 P.3d 987, 995-96 (2000).

Maestas relies on *Ring*, which implicates the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment's due process requirement. 536 U.S. at 609; *see also Apprendi*, 530 U.S. at 477 n.3. To the extent that due process requires that a defendant receive adequate notice of the aggravating circumstances, the notice of intent required under Nevada law, SCR 250(4)(c)-(d), affords sufficient notice of aggravating circumstances to satisfy that requirement. *Cf. McKaney v. Foreman*, 100 P.3d 18, 21 (Ariz. 2004). Nothing in *Ring* or the due-process notice requirement necessitates notice regarding the weighing of aggravating and mitigating circumstances. *See Ring*, 536 U.S. at 597 n.4.

[Headnote 12]

Finally, the amended notice of intent was not untimely and the State was not required to demonstrate good cause to file the amended notice. SCR 250(4)(d) permits the State to file an untimely ''amended notice [of intent] alleging additional aggravating circumstances,'' upon a showing of good cause, within 15 days ''after learning of the grounds for the . . . amended notice.'' The plain language indicates that the rule applies to amended notices that allege additional aggravating circumstances. Here, the State did not allege any additional aggravating circumstances in the amended notice of intent; rather, the State amended the notice to provide additional factual allegations to support the aggravating circumstances that were alleged in the original notice of intent. We conclude that under the circumstances presented, the State was not required to comply with SCR 250(4)(d).

Suppression of police statements

[Headnote 13]

Maestas contends that his death sentence is unconstitutional because the prosecution used statements that were obtained in violation of his right to remain silent. Maestas moved to suppress his statements in the district court, and the district court denied the motion after hearing argument. He challenges that decision.[17] We will not disturb a district court's determination of whether a defendant invoked his right to remain silent if that decision is sup-

[17]Maestas complains about the district court's failure to conduct an evidentiary hearing on his motion to suppress. A review of the record shows that an evidentiary hearing was not warranted because the parties did not appear to dispute the facts surrounding the taking of Maestas' statement and instead disputed the legal issue of whether he exercised his right to remain silent. *See U.S. v. Curlin*, 638 F.3d 562, 564 (7th Cir. 2011) (''District courts are required to conduct evidentiary hearings only when a substantial claim is presented and there are disputed issues of material fact that will affect the outcome of the motion [to suppress].''), *quoted with approval in Cortes v. State*, 127 Nev. 505, 509, 260 P.3d 184, 187-88 (2011).

ported by substantial evidence. *See generally Harte v. State*, 116 Nev. 1054, 1065, 13 P.3d 420, 427-28 (2000); *Tomarchio v. State*, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983).

[Headnote 14]

Before interviewing Maestas while he was in custody in Utah, Nevada police officers advised him of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In response to a police officer's invitation to ''tell us your side,'' Maestas stated, ''You know I think that I'd like to take the uh silence—but I would say that, ah, the act or crime I did do alone. I didn't have any help.'' The interrogating officer told Maestas, ''If you want to tell us about it and not implicate your sister, that's entirely up to you,'' to which Maestas stated, ''I just did, didn't I.'' The police officer inquired whether Maestas ''want[ed] to tell us how this came about,'' to which he responded, ''I really don't know.'' The interrogating officer then stated, ''Why don't you start from the beginning?'' Maestas then explained his involvement in the crimes.

The district court found that Maestas' statement about remaining silent was equivocal and that he did not invoke the protections of *Miranda*. It further found that Maestas was ''admonished of his right to remain silent and waived that right.'' We agree with the district court that nothing in the interview demonstrates the kind of unambiguous invocation of the right to remain silent that is required by the Supreme Court, *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); rather, Maestas initially indicated that he wanted to invoke his right to remain silent but in the same breath admitted that he alone committed the crimes, and when asked again if he wished to discuss the crimes, Maestas equivocated but then proceeded to make incriminating statements. We further agree with the district court that Maestas' conduct during the interview indicates an implied waiver of the right to remain silent. *Id.* at 382. The district court did not err by admitting Maestas' statement.[18]

Suppression of letter seized by jail personnel

[Headnote 15]

Maestas argues that the district court erred by refusing to hold an evidentiary hearing on his motion to suppress the letter he wrote to ''Amy'' while he was in custody in Utah. He argued below that the letter should be suppressed because he had a rea-

[18]Maestas challenges the voluntariness of his statement based on his arrest the day before the interrogation, the nature of the crime, his drug use, and his confinement in a Utah jail. Based on our review of the record, we conclude that this claim was not preserved for review. We may review for plain error, *see* NRS 178.602, but considering the totality of the circumstances reflected in the record and the factors outlined in *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987), we discern no plain error.

sonable expectation of privacy in correspondence sent from jail and had no notice that his outgoing mail would be confiscated by jail officials. On appeal, Maestas raises the notice issue and also argues for the first time that confiscation of the letter violated his First Amendment rights and was not justified by a legitimate penal interest.

The notice argument lacks merit. At a hearing on the motion, the prosecutor relayed that, according to a Utah jail official, inmates are provided with a handbook that explains that outgoing mail, except communications to attorneys, is subject to monitoring. Maestas denied receiving the handbook. The district court determined that the jail had ''a right to monitor [mail]'' for security reasons and that Maestas proffered no authority suggesting that he was entitled to notice before his mail was confiscated. We conclude that the district court did not err in this regard.

Maestas failed to raise his First Amendment claim below. That failure leaves us to consider the claim in the context of plain error. *See* NRS 178.602. The claim is not amenable to plain-error review for two reasons.

First, under the circumstances presented, we cannot say that any error is plain because it is not ''so unmistakable that it reveals itself by a casual inspection of the record.'' *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation omitted). For example, because the issue was not raised below, the record is not sufficiently developed for us to determine whether the jail policy regarding outgoing mail is reasonably related to legitimate penal interests. *See Turner v. Safley*, 482 U.S. 78, 89-90 (1987) (discussing factors that are relevant in determining reasonableness of prison regulation). We therefore lack an adequate basis upon which to review this claim. *See Wilkins v. State*, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980) (observing that while this court may consider constitutional issues raised for the first time on appeal, ''it will not do so unless the record is developed sufficiently both to demonstrate that fundamental rights are, in fact, implicated and to provide an adequate basis for review'').

Second, the alleged error is not ''clear under current law.'' *Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (internal quotation omitted). In particular, there does not appear to be a consensus as to whether the exclusionary rule applies to evidence obtained in violation of the First Amendment. *Compare United States v. Cangiano*, 464 F.2d 320, 328 (2d Cir. 1972) (concluding that ''where seizure of allegedly obscene materials is not preceded by a procedure which affords a reasonable likelihood that non-obscene materials will reach the public, the proper remedy is the return of the allegedly obscene materials to those from whom they were seized, not suppression of these items at a subsequent obscenity trial''), *vacated on other grounds*, 413 U.S. 913

(1973), *reaffirmed on remand*, 491 F.2d 905 (2d Cir. 1973), *and United States v. Bush*, 582 F.2d 1016, 1021 (5th Cir. 1978) (concluding that in obscenity prosecution appropriate remedy for violation of First Amendment is return of property, not suppression of evidence at trial), *with United States v. Hale*, 784 F.2d 1465, 1469 (9th Cir. 1986) (concluding that magazine that was basis for child pornography and obscenity convictions but not specified in search warrant was improperly seized and subject to exclusion because magazine was arguably protected by First Amendment at time of seizure), *abrogated on other grounds by New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986), *as stated in U.S. v. Weber*, 923 F.2d 1338, 1343 n.6 (9th Cir. 1990), *and State v. Bumanglag*, 634 P.2d 80, 92 (Haw. 1981) (concluding that in prosecution for promoting pornography ''the suppression of the seized films as evidence would be the only effective sanction for the relevant infringements of first and fourth amendment freedoms'').

Prosecutorial misconduct

[Headnotes 16, 17]

Maestas contends that extensive prosecutorial misconduct rendered his penalty hearing unfair. To support his claim, he points to multiple comments the prosecutor made during opening statement and closing argument, which essentially fall into four categories of claimed misconduct: (1) Golden Rule arguments, (2) appeals to passion and prejudice, (3) prosecutor's expression of personal opinion, (4) Maestas' failure to express remorse, and (5) holiday arguments. A prosecutor's improper comments during a capital penalty hearing are prejudicial when they so infect the proceedings with unfairness as to make the results of the proceeding a denial of due process. *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005); *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). Alleged improper statements should be considered in context. *Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008). And because Maestas failed to object to all but one of the challenged statements, his claims are reviewed for plain error affecting his substantial rights. NRS 178.602; *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). We have carefully reviewed each claim of unpreserved prosecutorial misconduct and conclude that Maestas has not demonstrated plain error affecting his substantial rights. With respect to the preserved challenge, we agree that the prosecutor improperly suggested that Maestas' true reason for pleading guilty was to avoid a lengthy trial that would reveal the details of the crime because the argument referenced matters not in evidence.

Nevertheless, the error was harmless considering the brevity of the comment in a lengthy closing argument and the overwhelming evidence supporting the death sentence.

Cumulative error

Maestas argues that cumulative error rendered his penalty hearing unfair. ''The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.'' *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Although Maestas' penalty hearing was not free from error, no error considered individually or cumulatively rendered his trial unfair. The quantity and character of any error committed is insignificant when juxtaposed to the overwhelming evidence supporting the death sentence in this case.

Mandatory review of the death penalty

[Headnote 18]

NRS 177.055(2) requires that this court review every death sentence and consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

The evidence sufficiently supports the aggravating circumstance

The jury found that Kristyanna was under 14 years of age when she was murdered, which is an aggravating circumstance under NRS 200.033(10). Because the evidence shows that Kristyanna was three years old when she was murdered, the aggravating circumstance was proven beyond a reasonable doubt.

The death sentence was not imposed under the influence of prejudice, passion, or any arbitrary factor

It is difficult to imagine a more horrendous killing than Kristyanna's. But nothing in the record indicates that the jury acted under any improper influence in imposing a death sentence for that killing. In fact, the special verdict reflects a deliberate and thoughtful jury, as one or more jurors found nine mitigating circumstances related to Maestas' troubled childhood, his lack of a prior criminal record, his admission of guilt, and his remorse. Therefore, we conclude that the death sentence was not imposed under the influence of prejudice, passion, or any arbitrary factor.

The death sentence is not excessive

[Headnotes 19, 20]

When considering whether the death sentence is excessive, we ask whether ''the crime and defendant before [the court] on appeal [are] of the class or kind that warrants the imposition of death?'' *Dennis v. State*, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000). The evidence shows that Maestas got a knife and drove to the trailer park bent on getting revenge for being duped out of $125 in a drug deal with Kristyanna's mother. He knew that the girls were alone in the trailer and could have left without incident; instead, he returned to the trailer with his sister and used subterfuge to gain entry into the trailer. He then viciously stabbed to death a defenseless three-year-old child. Afterwards, he cleaned up, disposed of the murder weapon and his bloody clothing, and fled the state. Although Maestas expressed remorse at trial and one or more jurors found remorse as a mitigating circumstance, his musings after the crimes showed little empathy for the young victim. The mitigation case paints the picture of a troubled young man who abused controlled substances and is the product of a dysfunctional, sometimes violent upbringing, but who was also described as being polite and friendly and not the kind of person who would commit the crimes that he admitted in this case. That picture is in stark contrast to the one painted by his actions on the night that Kristyanna was stabbed to death and her sister was left a paraplegic and in the immediate aftermath of that night. Despite Maestas' claim that the death penalty is excessive due to inflammatory prosecutorial and jury misconduct, the record simply does not bear that out. Instead, the record supports the conclusion that the crime and the defendant are of the class or kind that warrant the imposition of the death penalty. Accordingly, the death sentence in this case is not excessive.

Having determined that none of Maestas' claims warrant relief and that the death penalty was properly imposed, we affirm the judgment of conviction and the order denying the motion for a new trial.

SAITTA, C.J., and DOUGLAS, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

HOLIDAY RETIREMENT CORPORATION, APPELLANT, *v.* THE STATE OF NEVADA DIVISION OF INDUSTRIAL RELATIONS, RESPONDENT.

No. 54968

April 5, 2012 274 P.3d 759

Appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Employer sought judicial review of decision of the Division of Industrial Relations denying employer's request for reimbursement from subsequent injury account for private carriers. The district court denied petition. Employer appealed. The supreme court, DOUGLAS, J., held that employer was required to acquire knowledge of employee's permanent physical impairment before a subsequent injury occurred to qualify for reimbursement from the statutory subsequent injury account for private carriers.

Affirmed.

[Rehearing denied June 1, 2012]

[En banc reconsideration denied August 1, 2012]

Lewis Brisbois Bisgaard & Smith, LLP, and *Nancy E. Helmbold, Alyssa M. Fischer*, and *Daniel L. Schwartz*, Las Vegas, for Appellant.

Nancy E. Wong, Carson City; *John F. Wiles* and *Jennifer J. Leonescu*, Henderson, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court's function when reviewing a district court's order denying a petition for judicial review is the same as the district court's: to determine whether substantial evidence supports the appeals officer's decision and whether that decision is affected by legal error.
2. ADMINISTRATIVE LAW AND PROCEDURE; STATUTES.
   The supreme court reviews de novo pure questions of law, including the administrative construction of statutes.
3. ADMINISTRATIVE LAW AND PROCEDURE; STATUTES.
   The supreme court gives deference to an agency's interpretation of its statutes and regulations if the interpretation is within the language of the statute.
4. STATUTES.
   If the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.
5. CONSTITUTIONAL LAW.
   It is the prerogative of the Legislature, not the supreme court, to change or rewrite a statute.

6. WORKERS' COMPENSATION.
Employer was required to acquire knowledge of employee's permanent physical impairment before a subsequent injury occurred to qualify for reimbursement from the statutory subsequent injury account for private carriers; permitting an employer to seek reimbursement after retaining a permanently physically impaired worker would have been akin to providing an employer an option to buy casualty insurance to cover a casualty that had already occurred. NRS 616B.587(4).

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we review a district court order denying a petition for judicial review in a workers' compensation action. We conclude that the district court did not err in denying judicial review because an employer is required to acquire knowledge of an employee's permanent physical impairment before a subsequent injury occurs to qualify for reimbursement from the subsequent injury account for private carriers under NRS 616B.587(4). Therefore, we affirm.

FACTS

Appellant Holiday Retirement Corporation hired a woman and her husband as co-managers of a retirement residence. The woman suffered injury arising out of and in the course of her employment in 2003. A doctor diagnosed her injury as a lumbar strain and gave her modified duty restrictions. The pain persisted, and she was taken off work duty to allow full-time medication. An MRI revealed evidence of previous back surgeries, which were performed in 1989 and 1993. This was the first record provided to Holiday of the woman's previous permanent physical impairment. To treat the 2003 injury, she underwent another surgery. After surgery, she was again given modified work duty restrictions, and she worked four hours per day, five days a week. However, the parties do not dispute that the husband and wife team performed their full comanagerial duties during this time. Less than one year after sustaining the 2003 industrial injury, the injured employee and her husband resigned.

Subsequently, an impairment rating examiner designated by respondent State of Nevada Division of Industrial Relations (DIR) performed a permanent partial disability (PPD) evaluation on the woman and found her to have 35-percent whole person impairment. The examiner apportioned 75 percent of the 35-percent impairment to the employee's 2003 industrial injury and therefore

suggested that she receive a PPD award based on 26-percent whole person impairment, which was paid.

Holiday's insurance carrier sought reimbursement from the Subsequent Injury Account for Private Carriers (Account) pursuant to NRS 616B.587, which provides for reimbursement when an employee sustains an injury entitling him or her to compensation for disability that is substantially greater due to the combined effects of a preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone, provided certain conditions are met. NRS 616B.587. One such condition is that the insurer ''establish by written records that the employer had knowledge of the 'permanent physical impairment' at the time the employee was hired or that the employee was retained in employment after the employer acquired such knowledge.'' NRS 616B.587(4). DIR denied the request for reimbursement. In its determination memorandum, DIR noted that NRS 616B.587(4) had not been satisfied because Holiday did not have knowledge of its employee's prior permanent physical impairment until the day after her 2003 industrial injury, and there was no indication that it ''provided a permanent modified duty or permanent full duty position to [its injured employee].''

Holiday administratively challenged the DIR's decision.[1] In affirming the DIR's decision on an alternative basis, the appeals officer found that the purpose of the Account was ''to encourage employers to hire workers with disabilities and to provide relief to the employer and its private carrier in the event of a *subsequent* injury.'' Citing to a treatise on workers' compensation law, the appeals officer explained that this policy underlying the Account also extended to retaining workers with prior impairments, so long as they were retained (1) after the employer gained knowledge of the condition and (2) before the subsequent injury. The appeals officer noted that ''[i]f . . . relief . . . is provided to employers

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[1]After an administrative hearing, the appeals officer requested supplemental briefing on a related, but different, issue: ''[w]hether the proper context of NRS 616B.587(4) is that the employer must demonstrate in writing that it either hired or retained the employee after it had knowledge of his disability *prior to the second injury* in order to be considered for relief from the Subsequent Injury Account Fund.'' DIR responded by submitting a letter stating that it had ceased denying reimbursement in cases where the employer learns of the preexisting impairment after the subsequent injury based on a permanent injunction enjoining the Subsequent Injury Board for Self-Insured Employers from that practice. Holiday responded by agreeing with DIR that the issue had been decided by a permanent injunction that forbids the Self-Insured Employer's Board from denying claims made against the Subsequent Injury Fund when the employer is not aware of the existing or previous injury before the subsequent injury.

who retain an injured employee after the second injury, with no evidence that the employee was hired or retained with knowledge of his first injury, the employer benefits from the [Account] without having first met the eligibility requirements of NRS 616B.587(4).''

The appeals officer found that under NRS 616B.587(4), in order to be considered for relief from an Account, the employer must have either hired or retained the employee with knowledge of the preexisting impairment prior to the second injury. He further found that whether the retention provision of NRS 616B.587 has been met must be determined at the time the employee sustains the subsequent injury. The appeals officer reasoned that any other interpretation of NRS 616B.587(4) would render its ''written records'' requirement superfluous. He explained that because the second injury is already the subject of the written claim from which the private carrier is seeking relief, the written records requirement of NRS 616B.587(4) is clearly intended to be in relation to the preexisting disability. He noted that this interpretation was in accordance with how other jurisdictions interpreted similar statutes. The appeals officer concluded that substantial evidence in the record supported DIR's conclusion that NRS 616B.587(4) was not satisfied and affirmed the denial of Holiday's request for reimbursement from the Account.

Holiday filed a petition for judicial review, which the district court denied based on its determination that the appeals officer interpreted NRS 616B.587 correctly. This appeal followed.

DISCUSSION

[Headnotes 1-5]

This court's function when reviewing a district court's order denying a petition for judicial review is the same as the district court's: to determine whether substantial evidence supports the appeals officer's decision and whether that decision is affected by legal error. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). This court reviews de novo pure questions of law, including the administrative construction of statutes. *Id*. at 1107-08, 146 P.3d at 806-07. This court gives deference to an agency's interpretation of its statutes and regulations ''if the interpretation is within the language of the statute.'' *Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008). But if '' 'the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' '' *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (quoting *Erwin v. State of Nevada*, 111 Nev.

1535, 1538-39, 908 P.2d 1367, 1369 (1995)). It is the prerogative of the Legislature, not this court, to change or rewrite a statute. *Breen v. Caesars Palace*, 102 Nev. 79, 86-87, 715 P.2d 1070, 1075 (1986).

NRS 616B.587(4) states:

> To qualify under this section for reimbursement from the [Account], the private carrier must establish by written records that the employer had knowledge of the ''permanent physical impairment'' at the time the employee was hired or that the employee was retained in employment after the employer acquired such knowledge.

We find that this language is plain and unambiguous. Therefore, neither the appeals officer nor this court is permitted to search for meaning beyond the statute itself.

[Headnote 6]

Based on the plain language of NRS 616B.587(4), a private carrier may qualify for reimbursement under the Account in one of two ways: by establishing with written records either that the employer (1) had knowledge of the permanent physical impairment at the time the employee was hired or (2) retained its employee after it acquired knowledge of the permanent physical impairment. Here, the parties do not dispute that Holiday had no knowledge of its employee's preexisting permanent disability at the time she was hired. However, the parties dispute whether an employer must acquire knowledge of an employee's permanent physical impairment before the subsequent injury occurs in order to satisfy the retention requirement of NRS 616B.587(4).

The majority of jurisdictions that have considered such a knowledge requirement within the context of a subsequent injury fund have held that an employer must acquire knowledge of an employee's permanent physical impairment before the subsequent injury occurs to qualify for reimbursement. *See Special Fund Div. v. Indus. Com'n of Ariz.*, 909 P.2d 430, 434 (Ariz. Ct. App. 1995). This interpretation recognizes the ''critical difference'' between an employer who retains a permanently physically impaired worker before a subsequent injury occurs and one who retains a permanently physically impaired worker after the subsequent injury has already occurred. *Id.* at 433. In the former situation, the potential for liability remains contingent; in the latter, the potential for liability is certain. *Id.* at 433-34. Permitting reimbursement in the latter situation is akin to ''providing employers an option to buy casualty insurance to cover a casualty that has already occurred.'' *Id.* at 434.

We now adopt the sound reasoning of the majority and hold that an employer must acquire knowledge of an employee's permanent

physical impairment before the subsequent injury occurs to qualify for reimbursement from the subsequent injury account for private carriers under NRS 616B.587(4). Accordingly, we affirm the district court's order denying judicial review.

HARDESTY and PARRAGUIRRE, JJ., concur.

KEVIN RODRIGUEZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56413

April 5, 2012 273 P.3d 845

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, coercion with the use of a deadly weapon, possession of a credit or debit card without the cardholder's consent, and obtaining or using personal identifying information of another. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Defendant was convicted in the district court of conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, and other crimes. Defendant appealed. The supreme court, HARDESTY, J., held that: (1) as matter of first impression, 10 of 12 text messages sent to victim's boyfriend from victim's cellular telephone following sexual assault were not properly authenticated to extent that State's evidence did not demonstrate that defendant was author of text messages; (2) error in admission of text messages that were not properly authenticated as having been authored by defendant was harmless; and (3) probative value of DNA analysis of sneaker that was identical to sneaker being worn by person using victim's bank card at automated teller machine, based on which forensic scientist testified that defendant could not be excluded as source of DNA, was not substantially outweighed by danger of unfair prejudice.

Affirmed.

Susan D. Burke, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy Dis-

trict Attorney, and *Samuel G. Bateman*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews the district court's decision on each evidentiary challenge for an abuse of discretion.
2. CRIMINAL LAW.
   Of 12 text messages that were sent to victim's boyfriend from victim's cellular telephone following sexual assault, 10 were not properly authenticated to extent that State's evidence did not demonstrate that defendant was author of text messages. NRS 52.015(1).
3. CRIMINAL LAW.
   Establishing the identity of the author of a text message through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility.
4. CRIMINAL LAW.
   Error in admission of 10 of 12 text messages sent to victim's boyfriend from victim's cellular telephone following sexual assault that were not properly authenticated as having been authored by defendant was harmless in trial for conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, and other crimes, when there was overwhelming evidence to support guilty verdicts. NRS 52.015(1).
5. CRIMINAL LAW.
   Probative value of DNA analysis of sneaker that was identical to sneaker being worn by person using victim's bank card at automated teller machine, based on which forensic scientist testified that defendant could not be excluded as source of DNA, was not substantially outweighed by danger of unfair prejudice, in trial for conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, and other crimes; scientist did not testify that defendant was source of DNA found on sneakers, and defense counsel competently cross-examined scientist regarding tests conducted on DNA evidence. NRS 48.035(1).
6. CRIMINAL LAW.
   The results of DNA analysis may demonstrate that the source of the known sample, while not conclusively determined to be the source of the discovered DNA sample, cannot be eliminated as the source of that sample.
7. CRIMINAL LAW.
   When an error has not been preserved, the supreme court employs plain-error review: an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights by causing actual prejudice or a miscarriage of justice.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we focus on two issues. First, we consider authentication and other evidentiary challenges to the admissibility of text messages. In particular, we conclude that text messages are

subject to the same authentication requirements under NRS 52.015(1) as other documents, including proof of authorship. Here, we conclude that the district court abused its discretion in admitting 10 of the 12 text messages that the State claimed were sent by the appellant, a codefendant, or both using the victim's cell phone because the State failed to present sufficient evidence corroborating the appellant's identity as the person who sent the 10 text messages. However, we conclude that the error was harmless.

Second, we examine whether testimony that a defendant could not be excluded as the source of a discovered DNA sample is admissible in the absence of supporting statistical data reflecting the percentage of the population that could be excluded as the source of the discovered DNA sample. We hold that, so long as it is relevant, DNA nonexclusion evidence is admissible because any danger of unfair prejudice or of misleading the jury is substantially outweighed by the defendant's ability to cross-examine or offer expert witness evidence as to probative value. Here, we conclude that the district court did not abuse its discretion by admitting the relevant DNA nonexclusion evidence. Accordingly, we affirm the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

On the night of May 12, 2008, a woman was attacked in her apartment by two men. One of the men warned the victim that they would ''blow [her] head off'' if she moved. The men then blindfolded the victim, and she heard them pulling the shoelaces out of her shoes. The men used the shoelaces to bind her arms and legs while she was lying on the floor on her stomach. The men questioned her about where she kept her money, and when the victim claimed not to have any, they again threatened to blow her head off.

While one of the men held her down, the victim could hear the other man rummaging through her kitchen. The victim then felt what she thought was one of the men poking her in the ribcage with a knife, and she also thought there was an object on the floor that felt like a gun. The victim finally confessed to the men that she kept her debit card in her car, and said she would give them the personal identification number (PIN).

The men carried the victim from the living room to the bedroom and threw her onto the bed. As one of the men began to sexually assault her, the second man obtained the debit card from the victim's car. The man who was assaulting the victim kept threatening to kill her if she resisted too much. After the sexual assault, the men threw the victim in the closet in her bedroom and threatened to come back and kill her if she gave them the incorrect PIN. Later, the victim escaped to a neighbor's apartment where she called the police. She was later taken to a hospital.

The victim's boyfriend came to the hospital and showed some text messages he had received earlier that night to the detective who accompanied the victim to the hospital. The victim's boyfriend had been texting with the victim earlier in the evening, and when she stopped responding he assumed she had fallen asleep. In the early morning hours of May 13, 2008, the victim's boyfriend started receiving the following text messages from the victim's phone:

- ''Willy boy, you better [%00].''[1] (1:29 a.m.).
- ''Willy, do you love me.'' (1:30 a.m.).
- ''You better go check on your b----.'' (1:38 a.m.).
- ''Not playing, not going to answer the phone. You better go check on that . . . b----, she is, you know.'' (1:42 a.m.).
- ''You dumb ass idiot, you're not talking to her. You better go to her house now. I have to keep my promise and I'm not going back over there. I think you should.'' (1:47 a.m.).
- ''You're an a------. Come over . . . there or your girl is going to suffocate, idiot.'' (1:50 a.m.).
- ''Yeah, you better go over there now. She is in the closet tied up.'' (1:53 a.m.).
- ''I hope you is going over there.'' (2:00 a.m.).
- ''We just f----- your b----.'' (2:02 a.m.).
- ''I'm not going to tell me or you no more. She even told me she got herps.'' (2:05 a.m.).
- ''How is your girl? Is she okay?'' (3:08 a.m.).
- ''You're lucky I didn't kill that b---- and I told you.'' (4:21 a.m.).

The victim's phone was recovered from the codefendant's cousin, who testified at trial that the codefendant asked him to take the phone when he and Rodriguez were arrested. The phone contained photos of Rodriguez, the codefendant, and the codefendant's girlfriend.

Other evidence linked Rodriguez and the codefendant to ATM withdrawals from the victim's bank account. The victim's debit card was used at an ATM on Las Vegas Boulevard at 12:43 a.m. on May 13, about five minutes before the victim called the police. The ATM was close in proximity to the victim's apartment. Less than ten minutes later, the card was used to withdraw about $500 in multiple transactions at another ATM. The card was also used at a third ATM. After viewing surveillance videos from the ATMs, a detective with the Las Vegas Metropolitan Police Department

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[1]The victim's boyfriend described it as saying ''Willy boy, you better percentage zero, zero,'' but he did not know what that meant.

(LVMPD) identified Rodriguez and codefendant Timothy Sanders as the men in the videos using the victim's debit card.

Rodriguez was further linked to the ATM transactions through DNA evidence. LVMPD forensic scientist Julie Marschner testified regarding various DNA samples obtained from items seized during the investigation. Among those items was a pair of sneakers identical to sneakers that Rodriguez was depicted wearing in the ATM surveillance videos. Marschner testified that she compared the DNA sample taken from the sneakers with DNA samples obtained from Rodriguez, the victim, Sanders, Sanders's cousin, and the victim's boyfriend. Marschner could not exclude Rodriguez as a contributor to the DNA sample taken from the sneakers. On cross-examination, defense counsel questioned Marschner about the DNA results related to the sneakers. When defense counsel asked Marschner if she was able to exclude any percentage of the population as the source of the DNA sample she tested, Marschner admitted that she did not calculate that statistical information for the sneakers. Defense counsel then objected to Marschner's testimony on the basis that it was ''meaningless.'' The district court overruled the objection, finding that the evidence ''goes to the weight of the admissibility. Also, . . . counsel indicated the records were timely turned over to defense counsel. Defense could have hired their own expert or ask[ed] that additional tests be run.''

After a seven-day jury trial, Rodriguez was found guilty of multiple counts. Rodriguez now appeals his conviction.

DISCUSSION

On appeal, Rodriguez argues that the district court erred in overruling his objection to the admission of 12 text messages because the State failed to authenticate the messages and the messages constituted inadmissible hearsay. He further argues that the district court erred in overruling his objection to the admission of DNA nonexclusion evidence because the evidence was irrelevant without supporting statistical data. Relying on NRS 48.035(1), Rodriguez argues that the probative value of the DNA evidence ''was greatly outweighed by the danger of unfair prejudice and misleading the jury.'' He contends that Marschner's testimony on direct examination implied that Rodriguez was a contributor when, in reality, anyone could have been a contributor. We examine each issue in turn.

Admissibility of a proffered text message[2]

Text messages offer new analytical challenges when courts consider their admissibility. However, those challenges do not require

[2]The term ''text message'' as used in this opinion refers to any short written message sent over a cellular network from one cell phone to another.

a deviation from basic evidentiary rules applied when determining authentication and hearsay. We take this opportunity to address several of those rules as they apply to text messages.

[Headnote 1]

Rodriguez argues that the district court erred in admitting the 12 text messages because the State failed to authenticate the messages and they therefore are not relevant, and the messages are hearsay. We review the district court's decision on each challenge for an abuse of discretion. *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009).[3]

Authentication and identification

[Headnote 2]

Rodriguez first complains that the State did not sufficiently authenticate the text messages. In particular, he argues that the State did not establish that he sent the messages and therefore they were not admissible against him.

Only relevant evidence is admissible. NRS 48.025(2). NRS 48.015 defines ''relevant evidence'' as ''evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'' ''Authentication 'represent[s] a special aspect of relevancy,' . . . in that evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims.'' *U.S. v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992) (alteration in original) (citation omitted) (quoting Fed. R. Evid. 901(a) advisory committee's note). ''The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims.'' NRS 52.015(1).[4] Because

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[3]The State also argues that this court should deem the issue waived because Rodriguez did not object to the State's extensive discussion of the text messages during its opening argument. We conclude that this argument is without merit because Rodriguez did timely object when the text messages were being introduced as evidence. *Cf. Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) (indicating that an objection to the admission of evidence is timely if made when the evidence is introduced for admission); *Layton v. State*, 87 Nev. 598, 600, 491 P.2d 45, 47 (1971). Furthermore, ''[o]pening statements of counsel . . . are not evidence of any character or of anything, and cannot be so considered by the jury.'' *State v. Olivieri*, 49 Nev. 75, 77-78, 236 P. 1100, 1101 (1925).

[4]Federal Rule of Evidence 901(a) is similarly worded to Nevada's authentication rule, NRS 52.015(1), and this court often views ''federal decisions involving the Federal Rules of Civil Procedure [as] persuasive authority when this court examines its rules.'' *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

the authentication inquiry is whether ''the matter in question is what its proponent claims,'' the proponent of the evidence ''can control what will be required to satisfy the authentication requirement'' by ''deciding what he offers it to prove.'' 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 7104, at 31 (1st ed. 2000) (internal quotation marks omitted). The question then is what is necessary to authenticate a text message.

Although this presents a question of first impression for this court, other courts have addressed the authentication of text messages, and we turn to their decisions for guidance. For example, the Superior Court of Pennsylvania considered the authentication of text messages where a detective testified to how he transcribed the text messages and that the transcription was an accurate reproduction of the text messages on the defendant's phone, but the prosecution conceded that the defendant did not author all of the text messages on her phone. *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super. Ct. 2011). The court observed that, as with non-electronic documents generally, the identity of the sender is critical to authenticating text messages, *see id.* at 1004-05, and that ''the difficulty that frequently arises in . . . text message cases is establishing authorship,'' *id.* at 1004. The court reasoned that a person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because ''cellular telephones are not always exclusively used by the person to whom the phone number is assigned.'' *Id.* at 1005. Thus, some additional evidence, ''which tends to corroborate the identity of the sender, is required.'' *Id.* Circumstantial evidence corroborating the sender's identity may include the context or content of the messages themselves, *id.* at 1004-05, such as where the messages ''contain[ ] factual information or references unique to the parties involved,'' *id.* at 1004. Other jurisdictions similarly have focused on the sender's identity and looked to the context and content of the text messages for sufficient circumstantial evidence identifying the sender. *See, e.g.*, *Dickens v. State*, 927 A.2d 32, 36-37 (Md. Ct. Spec. App. 2007) (identifying details in text messages that could have been known by only a small number of persons, including defendant, defendant's conduct after the messages were sent, and nickname used in one message as circumstantial evidence sufficient to link defendant to the messages); *State v. Taylor*, 632 S.E.2d 218, 230-31 (N.C. Ct. App. 2006) (pointing to information in the message and that sender identified himself twice using the victim's first name as sufficient circumstantial evidence that the victim sent the messages).

[Headnote 3]

As the reasoning of these jurisdictions illustrates, establishing the identity of the author of a text message through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility. We thus conclude that, when there has been an objection to admissibility of a text message, *see* NRS 47.040(1)(a), the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission, *see* NRS 52.015(1); *see also* NRS 47.060; NRS 47.070.[5]

Here, the State offered the text messages to prove that Rodriguez was one of the men who assaulted the victim. As such, the messages were only relevant to the extent that the State could authenticate them as being authored by Rodriguez. The State established that the victim's cell phone was stolen during the attack. The victim's boyfriend testified that he received the 12 text messages on his cell phone from the telephone number assigned to the victim's cell phone, and the State showed that the victim's boyfriend began receiving those messages shortly after the assault. The State also presented evidence indicating that Rodriguez and Sanders were in possession of the victim's cell phone prior to their arrests. When the victim's phone was recovered by the police, it contained the 12 text messages, as well as photographs of Rodriguez that were taken after the phone was stolen. Although the State provided sufficient evidence that the text messages offered into evidence were sent from the victim's cell phone to her boyfriend's cell phone during a time when Rodriguez and Sanders had access to the victim's cell phone, the State only provided sufficient evidence to show that Rodriguez participated in authoring 2 of the 12 proffered text messages—the text message sent at 1:29 a.m. stating, ''Willy boy, you better [%00]'' and the text message sent at 1:30 a.m. stating, ''Willy, do you love me.'' Those two text

[5]We note that once a text message is admitted into evidence, the opponent may rebut its authentication, and it is for the jury to decide whether the proponent sufficiently proved his or her claims regarding the text message. *See* NRS 52.015(3) (''Every authentication or identification is rebuttable by evidence or other showing sufficient to support a contrary finding.''); *United States v. Branch*, 970 F.2d 1368, 1370-71 (4th Cir. 1992) (''Before admitting evidence for consideration by the jury, the district court must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic. . . . Although the district court is charged with making this preliminary determination, because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims.'' (citations omitted)).

messages were sent while Rodriguez and Sanders were on a bus together following the assault. The bus's surveillance video demonstrates that, with Rodriguez seated next to him and watching, Sanders held and operated the victim's cell phone. While it does not appear that Rodriguez typed the two text messages, he had firsthand knowledge of the messages and appeared to be participating in composing the messages. Based on this, we conclude that the State provided sufficient direct and circumstantial evidence that tends to corroborate that the two text messages sent at 1:29 a.m. and at 1:30 a.m. were what the State claimed them to be—messages sent or endorsed by Rodriguez that connect him to the assault. However, the record is devoid of any evidence that Rodriguez authored or participated in authoring the ten text messages that were sent after he and Sanders exited the bus around 1:36 a.m. In fact, the evidence suggests that it was Sanders, not Rodriguez, who had possession of the cell phone before they were arrested. Because those ten text messages were not sufficiently authenticated, we conclude that the district court abused its discretion in admitting them.

[Headnote 4]

Notwithstanding the district court's improper admission of the ten remaining text messages against Rodriguez, we conclude that the error was harmless. *See Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (''The test . . . is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' '' (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))). There was other overwhelming evidence to support the jury's verdict: the victim's testimony that the men who assaulted and robbed her took her debit card and her cell phone; the ATM surveillance videos depicting Rodriguez and Sanders using the victim's debit card at three separate locations, all in close proximity to the victim's apartment shortly after she was attacked; the bus surveillance video showing Rodriguez and Sanders using the stolen cell phone; and pictures of Rodriguez on the victim's phone taken after it was stolen from her apartment.

Hearsay

We next address Rodriguez's hearsay objection to the text messages. As a general rule, hearsay is inadmissible. NRS 51.065. Nevada generally defines ''[h]earsay'' in NRS 51.035 as ''a statement offered in evidence to prove the truth of the matter asserted.'' NRS 51.035 also excludes certain statements from that definition, such as a statement offered against a party ''of which [that] party has manifested adoption or belief in its truth,'' NRS 51.035(3)(b).

We conclude that the two text messages that were authenticated are not hearsay pursuant to NRS 51.035(3)(b).[6]

Admissibility of DNA nonexclusion evidence

[Headnote 5]

Relying on NRS 48.015 and NRS 48.035(1), Rodriguez argues that the district court committed error by admitting testimony that he could not be excluded as the source of the DNA obtained from the sneakers absent testimony explaining the statistical relevance of the nonexclusion result, such as the percentage of the population that could be excluded. According to Rodriguez, the DNA nonexclusion evidence is either irrelevant or had limited probative value but a significant risk of unfair prejudice or misleading the jury without the additional statistical analysis to provide context. We disagree.

[Headnote 6]

DNA nonexclusion results are derived from a comparison of a discovered DNA sample and a known DNA sample. *See Sholler v. Com.*, 969 S.W.2d 706, 709 (Ky. 1998). The results of DNA analysis may demonstrate that the source of the known sample, while not conclusively determined to be the source of the discovered DNA sample, cannot be eliminated as the source of that sample. *Id*.

As noted above, this court ''review[s] a district court's decision to admit or exclude evidence for an abuse of discretion.'' *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). In resolving whether nonexclusion DNA results are admissible in the absence of supporting statistical data reflecting the percentage of the population that could be excluded, we examine as instructive authority the approach other jurisdictions have taken on this issue.

For example, in *State v. Harding*, the defendant challenged the trial court's decision to admit testimony regarding DNA evidence. 323 S.W.3d 810, 816 (Mo. Ct. App. 2010). The defendant argued that the DNA evidence, which indicated that he was a possible source of the tested DNA samples, was irrelevant and thus inadmissible because the DNA analyst failed to support her conclusion by conducting certain calculations ''for the random match probabilities'' on some of the DNA samples. *Id*. at 816-17. The DNA analyst simply testified that the defendant ''could not be eliminated as the source of the DNA found.'' *Id*. at 817. The court concluded that ''DNA evidence, even without a showing of statistical significance, is admissible,'' and that it is the fact-finder's duty to weigh

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[6]In a conclusory sentence, Rodriguez suggests that the admission of the text messages raises a confrontation issue. We disagree. The text messages were neither hearsay nor testimonial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

this evidence together with all other evidence presented when determining guilt. *Id.* The court went on to note the fallacy of the defendant's argument—if the DNA evidence eliminated the defendant as the source, ''such evidence would certainly be relevant and admissible even without statistics regarding the percentage of the population.'' *Id.* at 817 n.8.

Similarly, in *Sholler*, 969 S.W.2d at 709, the appellant challenged the admission of DNA evidence because it was unsupported by statistical analysis. The witness testified that her testing of the DNA samples ''matched'' DNA samples taken from the appellant; however, a match simply meant that the witness could not exclude the appellant as a possible source, not that he was the source, of the tested DNA samples. *Id.* The court held that the DNA evidence was admissible because it was ''both relevant and assisted the jury in determining whether [a]ppellant could have been the perpetrator of the[ ] crimes.'' *Id.* at 710. Furthermore, the court reasoned that questions as to the accuracy of the DNA test results are matters of weight for the jury. *Id.* It noted that ''[i]f [a]ppellant desired additional evidence of statistical probabilities based on [the DNA] test results, he could have hired his own population geneticist to analyze the results and testify to those probabilities.'' *Id.*

Finally, in *People v. Schouenborg*, 840 N.Y.S.2d 807, 808 (App. Div. 2007), the court held that statistical analysis was not required in order to admit DNA evidence because the DNA expert testified that she could not exclude the defendant as a contributor to the DNA sample she tested, not that the defendant matched the tested DNA sample.

In keeping with the holdings from these other jurisdictions, we conclude that DNA nonexclusion evidence is admissible in the absence of supporting statistical data reflecting the percentage of the population that could be excluded as long as the nonexclusion evidence is relevant, because any danger of unfair prejudice or of misleading the jury is substantially outweighed by the defendant's ability to cross-examine or offer expert witness evidence as to probative value. *See* NRS 48.015; NRS 48.035(1).

[Headnote 7]

Here, Marschner testified that Rodriguez could not be excluded as a contributor to the DNA sample from the sneakers, not that he was the source of the DNA sample. Additionally, defense counsel competently cross-examined Marschner regarding the tests she conducted on the DNA evidence. We determine that the DNA evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice or of misleading the jury. It was for the jury to decide the amount of weight to be given to this evidence. Furthermore, as the district court correctly found, Rodriguez had ample opportunity to rebut this evidence through his

own DNA expert testimony or by conducting his own testing of the DNA samples. Thus, we conclude that the district court did not abuse its discretion by admitting the DNA nonexclusion evidence.[7]

For the above reasons, we affirm the judgment of conviction.[8]

DOUGLAS and PARRAGUIRRE, JJ., concur.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO C.C.A., A MINOR.

CHARLES C.L.A., APPELLANT, *v.* THE STATE OF NEVADA DIVISION OF CHILD AND FAMILY SERVICES, DEPARTMENT OF HEALTH AND HUMAN RESOURCES; AND C.C.A., RESPONDENTS.

No. 56723

April 5, 2012 273 P.3d 852

Appeal from a district court order terminating appellant's parental rights as to the minor child. Tenth Judicial District Court, Churchill County; David A. Huff, Judge.

The Division of Child and Family Services (DCFS) petitioned to terminate father's parental rights to child. The district court terminated parental rights. Father appealed. The supreme court, DOUGLAS, J., held that reversal of order terminating father's parental rights was warranted when the district court failed to make factual findings that supported the termination order.

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[7]Rodriguez also appears to challenge the admissibility of Marschner's testimony regarding the DNA nonexclusion evidence related to the victim's cell phone. However, Rodriguez admits in his opening brief that he only objected during trial to the DNA nonexclusion evidence concerning the sneakers. ''When an error has not been preserved, this court employs plain-error review. Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.' '' *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (footnote omitted) (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)); *see also Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006). Because Rodriguez has failed to demonstrate how his substantial rights were affected, and because we conclude that the district court did not err in admitting the DNA nonexclusion evidence related to the sneakers, we also conclude that the district court did not commit plain error by admitting the DNA nonexclusion evidence related to the victim's cell phone.

[8]Rodriguez also argues that cumulative error warrants reversal, that the State committed prosecutorial misconduct by making an improper statement to the jury, and that the district court erred by giving certain jury instructions and failing to give others. We conclude that these arguments are without merit and require no further discussion.

Reversed and remanded.

Steve E. Evenson, Lovelock, for Appellant.

Catherine Cortez Masto, Attorney General, and *Sharon L. Benson*, Deputy Attorney General, Carson City, for Respondent the State of Nevada Division of Child and Family Services, Department of Health and Human Resources.

Law Offices of Robert Witek and *Robert W. Witek*, Yerington, for Respondent C.C.A., a minor.

1. INFANTS.
   Reversal of order terminating father's parental rights was warranted when the district court failed to identify, orally or in writing, the factual bases that supported its termination order. NRS 128.105(1), (2); NRCP 52(a).
2. INFANTS.
   The supreme court will uphold the district court's termination order when it is supported by substantial evidence.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this termination of parental rights appeal, we address the need for the district court to make express findings of fact in its written order or on the record, when determining whether to grant or deny a petition to terminate a parent's parental rights. A petitioner in termination proceedings has the burden to prove by clear and convincing evidence that termination is in the child's best interest and that parental fault exists. When a district court fails to make any findings concerning this standard of proof in its order or on the record, this court is unable to determine on appeal whether substantial evidence supports the district court's ruling. In the present case, neither the district court's order nor the record contains findings of fact to support the district court's conclusions, and thus, we reverse the order terminating appellant's parental rights and remand this matter to the district court to enter its findings.

PROCEDURAL HISTORY

Appellant is the biological father of the minor child who is the subject of the underlying proceedings. The child was removed from appellant's care and subsequently placed in the legal custody of respondent State of Nevada, Division of Child and Family Services (DCFS). DCFS eventually petitioned the district court to ter-

minate appellant's parental rights. In its petition, DCFS asserted that it was in the child's best interest to terminate appellant's parental rights, and it listed six grounds of alleged parental fault.

During a two-day bench trial on the petition, DCFS and appellant, who was represented by appointed counsel, presented witnesses and evidence supporting their respective positions. At the close of evidence, the district court instructed the parties to submit their closing arguments in writing, and it reserved ruling on the termination petition. After the parties submitted their closing arguments, the district court entered a summary order terminating appellant's parental rights.

The district court's written order, drafted by the State, closely follows DCFS's termination petition and purports to set forth findings of fact. In particular, as to the child's best interest, the order states only that ''[t]he best interests of [the child] will be served by terminating any parental rights of [appellant].'' Regarding parental fault, the order identifies six bases for fault:

> [Appellant] has abandoned [the child] and has evinced a settled purpose to abandon him by not providing support and by not communicating with the child; he has neglected the child by failing to provide proper parental care by reason of his own faults and habits; he is an unfit parent in that by reason of his faults, habits, or conduct he has failed to provide the child with proper care, guidance or support; he has failed parental adjustment in that he has been unable or unwilling within a reasonable time to correct substantially the circumstances, conduct or conditions which led to the removal of his child; there would be a risk of serious physical, mental or emotional injury to the child if the child was returned to his care; and he has made only token efforts to avoid being an unfit parent, to support or communicate with the child or to eliminate the risk of serious physical, mental or emotional injury to the child.

These six grounds of parental fault track, without explanation as to any corresponding evidence, the termination statutory provisions for parental fault.[1] *See* NRS 128.012; NRS 128.0126; NRS 128.014; NRS 128.018; NRS 128.105(2)(e); NRS 128.105(2)(f). Following entry of the district court's written termination order, appellant timely filed this appeal.

DISCUSSION

On appeal, appellant contends that because the district court's order fails to set forth specific factual findings, the decision to terminate his parental rights is not supported by substantial evidence.

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[1]The legal conclusions set forth in the order are likewise conclusory statements citing to the applicable statutory provisions.

DCFS argues that the district court's order ''clearly made explicit findings,'' and that DCFS established, by clear and convincing evidence, that terminating appellant's parental rights was warranted.

Express findings of facts are required in parental rights termination proceedings

[Headnotes 1, 2]

It is well-settled that termination proceedings implicate a parent's fundamental rights in the care and custody of his or her child. NRS 128.005(1) and (2); *Matter of Parental Rights as to D.R.H.*, 120 Nev. 422, 426-27, 92 P.3d 1230, 1233 (2004); *Matter of Parental Rights as to C.J.M.*, 118 Nev. 724, 732, 58 P.3d 188, 194 (2002). In order to guard the rights of the parent and the child, the Nevada Legislature has created a statutory scheme intended to assure that parental rights are not erroneously terminated and that the child's needs are protected. NRS 128.005(1) (declaring ''that the preservation and strengthening of family life is a part of the public policy of this State''); NRS 128.005(2)(a) (recognizing that ''[s]everance of the parent and child relationship is a matter of such importance in order to safeguard the rights of parent and child as to require judicial determination''); *see generally* NRS Chapter 128. To that end, when petitioning the district court to terminate a parent's parental rights, a petitioner must demonstrate by clear and convincing evidence that termination is in the child's best interest and that parental fault exists. *See* NRS 128.090(2); NRS 128.105. This court will uphold the district court's termination order when it is supported by substantial evidence. *Matter of Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006).

Based on the interests at stake in these types of proceedings, a petitioner has a high burden to establish that termination is warranted—clear and convincing evidence. NRS 128.090(2); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (explaining that courts are required to apply a heightened clear and convincing standard of proof in termination of parental rights cases); *Matter as to D.R.H.*, 120 Nev. at 428, 92 P.3d at 1234 (recognizing that Nevada applies a clear and convincing standard of proof in termination proceedings). This standard of proof underscores the importance of the district court's fair and independent fact-finding. Thus, it is incumbent upon the district court in termination proceedings to provide a decision, whether in writing or orally on the record, that includes all the necessary factual findings for the benefit of the parties and this court's proper appellate review because without specific findings, this court cannot determine whether the district court's conclusions are supported by substantial evidence. NRS 128.105(1) and (2) (requiring a finding of best interest and parental fault); NRCP 52(a) (stating that when rendering a decision ''[i]n

all actions tried upon the facts without a jury[,] . . . the court shall find the facts specially and state separately its conclusions of law''); *Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 895, 266 P.3d 602, 608 (2011) (recognizing that oral pronouncements on the record that are consistent with a judgment may be used by the appellate court to construe the judgment); *see also In re Edward B.*, 558 S.E.2d 620, 632-33 (W. Va. 2001) (holding that a lower court's failure to comply with statutes and rules of procedure when issuing a final order impedes a proper appellate review); *Matter of T. R. M.*, 303 N.W.2d 581, 583-84 (Wis. 1981) (explaining that adequate findings are required to facilitate review by an appellate court).

In this case, the district court deferred ruling on the termination petition until it received the parties' written closing arguments, and thus, the court did not make any oral findings on the record. The subsequent written termination order does not reference any specific facts or evidence presented by the parties during the two-day bench trial; the order simply recites the statutory grounds required to terminate a parent's parental rights, and such statements do not constitute sufficient findings because they do not explain, based on the record evidence, why the district court found that the statutory grounds for termination existed. *See Perez v. Dept. of Children & Family Serv.*, 894 N.E.2d 447, 451 (Ill. App. Ct. 2008) (''Findings of fact are determinations from the evidence of a case . . . concerning facts averred by one party and denied by another.'' (internal quotation and citation omitted)); *Pacific Employers Ins. Co. v. Brown*, 86 S.W.3d 353, 356-57 (Tex. App. 2002) (stating that factual findings constitute ultimate determinations concerning what transpired during the proceedings and provide ''answer[s] to any other specific inquiry necessary to establish conduct or the existence or nonexistence of a relevant matter'').

Because the district court failed to identify, in writing or on the record, the factual bases that support its termination order, we cannot determine whether substantial evidence supports the district court's decision, and thus, we reverse the district court's order terminating appellant's parental rights and remand this case to the district court to enter its findings.[2] *See Robison v. Robison*, 100 Nev. 668, 673, 691 P.2d 451, 455 (1984) (remanding the case to the lower court because the court's findings failed to indicate the factual basis for its final conclusions).

HARDESTY and PARRAGUIRRE, JJ., concur.

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[2]We make no comment on the merits of the underlying proceeding. In light of this opinion, we elect not to consider the parties' remaining arguments.

DALE E. HALEY, ESQ.; CHRISTOPHER G. GELLNER, P.C.; AND CHRISTOPHER G. GELLNER, ESQ., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, RESPONDENTS, AND JOEL D. OREVILLO, M.D.; AND STEWART PULMONARY ASSOCIATES, LTD., DBA PULMONARY ASSOCIATES, REAL PARTIES IN INTEREST.

No. 57437

April 5, 2012 273 P.3d 855

Original petition for a writ of mandamus or prohibition challenging a district court order approving the compromise of a minor's claim in a medical malpractice action but directing a different distribution of the settlement proceeds than that agreed to by the parties.

Biological father of baby, who was born with severe brain damage due to oxygen deprivation to mother who died in childbirth, retained attorney to file wrongful death and personal injury claims on baby's behalf against physician and others. Thereafter, the parties reached a settlement before trial, and attorney submitted the proposed settlement for the court approval. The district court issued order approving the settlement but directed a different distribution of the settlement proceeds than that agreed to by the parties. Attorney and baby's guardian ad litem filed petition for a writ of mandamus or prohibition challenging the order. The supreme court, PARRAGUIRRE, J., held that: (1) in a matter of first impression, the district court had authority to unilaterally modify settlement agreement under statute governing the compromise of a minor's claim; (2) the district court did not abuse its discretion in concluding that the proposed allocation of portion of settlement proceeds to attorney was unreasonable; but (3) the district court, in reallocating attorney fees and costs to attorney and guardian ad litem, was required to reallocate the funds between the attorney and the guardian ad litem.

Petition granted in part and denied in part.

Christopher G. Gellner, P.C., and *Christopher G. Gellner*, Las Vegas; *Dale E. Haley*, Las Vegas, for Petitioners.

Catherine Cortez Masto, Attorney General, and *Robert J. Simon*, Deputy Attorney General, Carson City, for Respondents.

Mandelbaum, Ellerton & McBride and *Kim I. Mandelbaum*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS; PROHIBITION.
   Mandamus or prohibition writ relief is an extraordinary remedy, and therefore, the decision to entertain a writ petition lies within the supreme court's discretion.
2. PROHIBITION.
   A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction. NRS 34.320.
3. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
4. MANDAMUS.
   Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.
5. MANDAMUS; PROHIBITION.
   A writ will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170, 34.330.
6. ATTORNEY AND CLIENT; INFANTS; MANDAMUS.
   The supreme court may exercise its discretion to consider petition for writ of mandamus, challenging the district court's authority to unilaterally modify a settlement agreement, pursuant to statute governing the compromise of a minor's claim, which reallocated the fees and costs to be paid to baby's attorney and guardian ad litem from settlement proceeds in wrongful death and personal injury action on baby's behalf arising out of emergency delivery procedure in which mother died and baby was born with severe brain damage due to oxygen deprivation, as attorney and guardian ad litem had no right of appeal from underlying order directing a different distribution of settlement proceeds than that approved by the parties because attorney and guardian ad litem were not ''aggrieved parties,'' and the petition presented an issue of first impression. NRS 41.200; NRAP 3A(a).
7. INFANTS.
   Statute governing the compromise of a minor's claim allows the district court to assess the reasonableness of a petition to approve the compromise of a minor's claim and to ensure that approval of the proposed compromise is in the minor's best interest; this review necessarily entails the authority to review each portion of the proposed compromise for reasonableness and to adjust the terms of the settlement accordingly, including the fees and costs to be taken from the minor's recovery. NRS 41.200.
8. ATTORNEY AND CLIENT; INFANTS.
   The district court was not required to conduct evidentiary hearing before ruling on reasonableness of proposed allocation of portion of settlement proceeds to attorney, who had brought wrongful death and personal injury claims on baby's behalf arising out of emergency delivery procedure in which mother died and baby was born with severe brain damage due to oxygen deprivation, since statute governing the procedure for compromising the claims of a minor provided that approval by the court was based upon the filing of a verified petition in writing, and the court met and exceeded this requirement by reviewing the petition and also requesting supplemental information before ruling on the petition. NRS 41.200(1).
9. COSTS.
   The district courts have great discretion to award attorney fees, and this discretion is tempered only by reason and fairness.

10. COSTS.

The district court, in determining the amount of attorney fees to award, is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of relevant factors.

11. ATTORNEY AND CLIENT; INFANTS.

The district court did not manifestly abuse or arbitrarily and capriciously exercise its discretion in concluding that proposed allocation of $109.187.26 of $238,000 in settlement proceeds to attorney, who had brought wrongful death and personal injury claims on baby's behalf arising out of emergency delivery procedure in which mother died and baby was born with severe brain damage due to oxygen deprivation, was unreasonable, as the court reviewed attorney's contingency fee agreement with baby's biological father and the extensive briefing by the parties before reaching its decision, the court referenced attorney's limited experience as a medical malpractice attorney, and, in considering the complex nature of baby's claims, the court highlighted attorney's role in complicating the matter by noting the many amended motions, dismissals, and time-barred complaints resulting from attorney oversight. NRS 41.200.

12. INFANTS.

The district court, in reallocating a lump sum portion of settlement proceeds to both the attorney who had brought wrongful death and personal injury claims on baby's behalf, arising out of emergency delivery procedure in which mother died and baby was born with severe brain damage due to oxygen deprivation, and to the baby's guardian ad litem, was required to reallocate the funds between the attorney and the guardian ad litem, as the guardian ad litem was statutorily entitled to a reasonable amount in compensation, and it was unclear from the court's order whether the guardian ad litem's fees were included within the allocation of attorney fees, and if so, in what amount. NRS 41.200, 159.0455(1).

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this opinion, we address the scope of a district court's authority to unilaterally modify a settlement agreement under NRS 41.200, Nevada's statute governing the compromise of a minor's claim.

Because NRS 41.200 leaves the allocation of fees and costs to the district court's discretion, we conclude that the district court may adjust the terms of the settlement in accordance with the minor's best interest. As such, we deny in part this writ petition. However, because the district court in this case provided no explanation for the allocation of fees between the attorney and the guardian ad litem, we grant in part this writ petition.

FACTS AND PROCEDURAL HISTORY

In June 2005, Warren West's pregnant wife underwent an emergency delivery procedure at the University Medical Center of

Southern Nevada (UMC). West's wife died during the procedure, and their baby girl was born with severe brain damage due to oxygen deprivation.

Unable to care for the baby's medical needs, West relinquished her for adoption and she became a ward of the state. Nonetheless, West retained petitioner attorney Christopher Gellner to bring a wrongful death and personal injury claim on the baby's behalf against real parties in interest Dr. Joel Orevillo and Stewart Pulmonary Associates, Ltd. (SPA).[1] While litigation was ongoing, the baby was adopted and named Ashley, and petitioner Dale Haley was appointed as her guardian ad litem.

In July 2010, the parties reached a $238,000 settlement before going to trial. Of this amount, Gellner sought to allocate $109,187.26 to himself ($61,000 in fees and $48,187.26 in costs), $20,100 to Haley as guardian ad litem, $79,333.33 to Medicaid, and the remaining $29,379.41 for Ashley. Pursuant to statute, Gellner submitted the proposed compromise to the district court for approval.

The district court refused to approve the compromise because the attorney fees and costs exceeded the amount payable to the minor, and further directed a reduction in either the attorney fees or the Medicaid lien before resubmission. Instead of reworking the numbers, Gellner filed another motion to approve the compromise, arguing that the circumstances of this case justified the original disposition of proceeds. At the district court's request, Haley submitted a statement of his hours as guardian ad litem.

Upon receipt of this information, the district court approved the overall settlement of $238,000 and ordered payment of $79,333.33 to Medicaid. The district court refused, however, to approve the remaining disbursement and ordered Gellner to submit a copy of his retainer agreement. After review of Gellner's contingency fee, which provided for a 40% recovery after out-of-pocket expenses, the district court issued a final order for the remaining distribution, allotting $95,200 to be placed in a blocked financial investment for Ashley's benefit and $63,466.67 as fees and costs to Gellner and Haley, combined in the distribution as attorneys.

Petitioners Gellner and Haley now assert that the district court lacked the statutory authority to unilaterally alter the distribution, and even if it had such authority, they argue that the district court abused its discretion in making the alteration it did. Petitioners seek this court's intervention by way of extraordinary writ.

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[1]Gellner also filed wrongful death suits on behalf of West and his three other children against multiple UMC-affiliated defendants, but the parties reached a settlement. Subsequently, the claims of West and his other children against Dr. Orevillo and SPA (who are unaffiliated with UMC) were dismissed as time-barred. The baby's claims for wrongful death and personal injury against Dr. Orevillo and SPA were preserved under NRS 41A.097(4)(a)'s exception for minors with brain damage.

DISCUSSION

[Headnotes 1-5]

Writ relief is an extraordinary remedy, and therefore, the decision to entertain a writ petition lies within our discretion. *Cheung v. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). ''A writ of prohibition 'serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.' '' *Stephens Media v. Dist. Ct.*, 125 Nev. 849, 857, 221 P.3d 1240, 1246 (2009) (quoting *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009)); NRS 34.320. '' 'A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.' '' *Williams v. Dist. Ct.*, 127 Nev. 518, 524, 262 P.3d 360, 364 (2011) (quoting *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)); NRS 34.160. ''Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'' *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (internal citation omitted). A writ will not issue if the '' 'petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.' '' *Williams*, 127 Nev. at 524, 262 P.3d at 364 (quoting *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001)); NRS 34.170; NRS 34.330.

[Headnote 6]

As is relevant here, we have consistently held that the right to appeal is generally an adequate legal remedy precluding writ relief. *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). No right of appeal lies from the underlying order because neither Gellner nor Haley is an aggrieved party. NRAP 3A(a) (providing that only an aggrieved party may appeal from an adverse decision); *Albert D. Massi, Ltd. v. Bellmyre*, 111 Nev. 1520, 1521, 908 P.2d 705, 706 (1995) (stating that ''an attorney representing a client in a case is not a party to the action and does not have standing to appeal''); *In re Christina B.*, 23 Cal. Rptr. 2d 918, 926 (Ct. App. 1993) (noting that by definition, ''[a] guardian ad litem is not a party to the action, but merely a party's representative''). Further, we have stated that our consideration of a petition for extraordinary relief may be justified to clarify an important issue of law and when public policy is served by the invocation of our original jurisdiction. *Stephens Media*, 125 Nev. at 857, 221 P.3d at 1246.

Because petitioners have no adequate remedy at law, and because this petition presents an issue of first impression, we exercise our discretion to consider the merits of this writ petition. We conclude that mandamus relief is appropriate, in part, and deny the petition to the extent it requests a writ of prohibition.

To begin, we address whether a district court has authority under NRS 41.200 to unilaterally alter the distribution of settlement proceeds in approving the compromise of a minor's claim. After concluding that such authority exists, we then discuss the redistribution of Ashley's compromise.

I. *NRS 41.200 authorizes the district court to redistribute proceeds of a settlement agreement in the minor's best interest*

[Headnote 7]

NRS 41.200 sets out the procedure for compromising the claims of a minor. Subsection 1 of the statute provides that when a minor has a claim for money against a third person, either of the minor's parents or a guardian ad litem has the right to compromise the claim. NRS 41.200(1). A compromise is not effective until approved by the district court upon a verified petition in writing. *Id.* At issue here is whether the district court had authority to approve the compromise of a minor's claim by directing a distribution of the settlement proceeds different from that provided for in the petition for approval.

Petitioners contend that resolution of this matter necessitates our interpretation of NRS 41.200(4), suggesting that this provision merely affords the district court narrow authority to approve a compromise in its entirety and to then determine where the money will be paid on behalf of the minor, as opposed to determining the amount the minor will receive.

We disagree with petitioners' position, as such an interpretation directly contradicts the broad authority granted to the district court under NRS 41.200(1) to approve the proposed compromise of a minor's claim. This approval process expressly encompasses a review of the proposed apportionment of proceeds, including the amount to be used for attorney fees and other expenses. *See* NRS 41.200(2)(f) (providing that the petition must include the proposed allocation of attorney fees and other expenses). This conclusion is also consistent with the general authority set forth in NRCP 17(c), which allows the district court to issue any ''order as it deems proper for the protection'' of a minor.[2]

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[2]In other contexts involving minors, we have established as a matter of public policy that the ''best interests of the child'' are of primary weight and concern. For instance, in *Fernandez v. Fernandez*, 126 Nev. 28, 34-37, 222 P.3d 1031, 1035-37 (2010), we affirmed the district court's decision to modify a child support order, taking into account the best interests of the child, notwithstanding the parties' settlement agreement to the contrary. Also, we have previously incorporated the best interests of the child as a factor in the child's placement outside the home, even though the statute did not speak to the issue. *Clark County Dist. Att'y v. Dist. Ct.*, 123 Nev. 337, 346, 167 P.3d 922, 928 (2007) (directing that a child's best interests should be the central focus in determining placement with someone other than a parent, despite the fact that the relevant statute does not expressly provide for such).

We note that NRCP 17(c) is nearly identical to its federal counterpart, FRCP 17(c), which has been interpreted as charging the court with a ''special duty . . . to safeguard the interests of litigants who are minors.'' *See Robidoux v. Rosengren*, 638 F.3d 1177, 1181-82 (9th Cir. 2011) (instructing the district court to evaluate whether the net recovery of the minor is fair and reasonable in terms of the minor's claims and recovery in similar cases); *Salmeron v. United States*, 724 F.2d 1357, 1363 (9th Cir. 1983) (holding that ''a court must independently investigate and evaluate any compromise or settlement of a minor's claims to assure itself that the minor's interests are protected, even if the settlement has been recommended or negotiated by the minor's parent or guardian ad litem'' (citations omitted)). ''Integral to this protective judicial role is ascertaining whether attorney fee agreements involving minors . . . are reasonable.'' *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 243 (4th Cir. 2010). In *Abrams*, the Fourth Circuit reviewed a district court's decision to reduce attorney fees in approving the compromise of an incompetent party. *Id.* at 240. The court concluded that, regardless of the local rules, a district court has discretion to review attorney fees for reasonableness, so long as it adequately considers the requisite factors. *Id.* at 244 (setting forth 12 factors as guidance for the district court).

Taking into account Nevada's preference to consider a minor's best interest, an approach that is also supported by federal law, we conclude that NRS 41.200 allows the district court to assess the reasonableness of a petition to approve the compromise of a minor's claim and to ensure that approval of the proposed compromise is in the minor's best interest. This review necessarily entails the authority to review each portion of the proposed compromise for reasonableness and to adjust the terms of the settlement accordingly, including the fees and costs to be taken from the minor's recovery.[3] *Abrams*, 605 F.3d at 244. With this in mind, we address the district court's review of Ashley's proposed compromise and reallocation of attorney fees.

II. *Modification of the proposed compromise of Ashley's claim*

[Headnote 8]

To recall, the proposed compromise of Ashley's claim allocated $109,187.26 to petitioner Gellner and $20,100 to petitioner Haley. In approving the compromise, the district court reallocated $63,466.77 as fees and costs to ''attorneys'' without further explanation. Petitioners now assert that the modified distribution

[3]We note that the modification here had no impact on the overall settlement amount of $238,000. Instead, the district court merely modified the distribution of requested attorney fees and costs to be taken from the minor's recovery after the Medicaid lien was satisfied.

was unfair, arguing that it unreasonably reduced Gellner's recovery and failed to provide compensation for Haley as guardian ad litem.[4]

[Headnotes 9, 10]

Although NRS 41.200 is silent as to the standard for a district court to apply when reviewing a petition to approve the compromise of a minor's claim, we have otherwise applied a ''fair and reasonable'' approach for reviewing a lower court's decision to approve a settlement in which incompetent parties are involved. *Mainor v. Nault*, 120 Nev. 750, 758-59, 101 P.3d 308, 314 (2004). Similarly, district courts have great discretion to award attorney fees, and this discretion is tempered only by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). ''[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount,'' so long as the requested amount is reviewed in light of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *Shuette*, 121 Nev. at 864-65, 125 P.3d at 549.

[Headnote 11]

Here, the record demonstrates the district court's requisite consideration of the *Brunzell* factors in reaching its decision. *See Brunzell*, 85 Nev. at 349, 455 P.2d at 33 (directing the district court to consider four factors in calculating the reasonableness of attorney fees: (1) the qualities of the attorney, (2) the character of the work to be done, (3) the actual work performed by the attorney, and (4) the case's result). To begin, the district court reviewed Gellner's contingency fee agreement and the extensive briefing by the parties before reaching its decision. The district court then referenced Gellner's limited experience as a medical malpractice attorney. In considering the complex nature of Ashley's claims, the district court also highlighted Gellner's role in complicating the matter by noting the many amended motions, dismissals, and time-barred complaints resulting from attorney oversight. Finally, the district court balanced Ashley's lifelong special needs and potential for a multimillion dollar judgment against the proposed payment.

Thus, in light of this case's surrounding circumstances, the district court acted within its broad discretion by concluding that the

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[4]Gellner also argues that the district court was required to first conduct an evidentiary hearing as to the reasonableness of fees and costs before making its ruling. We disagree, as NRS 41.200(1) provides that approval by the district court is based upon the filing of ''a verified petition in writing.'' Here, the district court met and exceeded this requirement by reviewing the petition and also requesting supplemental information before ruling on the petition.

proposed allocation to petitioner Gellner was unreasonable. Accordingly, we deny writ relief in this regard.

[Headnote 12]

The problem with the district court's reallocation, however, is that it did not allocate the attorney fees and costs awarded to petitioner Gellner separately from any guardian ad litem fees awarded to petitioner Haley. *See* NRS 159.0455(1) (''The guardian ad litem is entitled to reasonable compensation from the estate of the ward or proposed ward.''). Instead, the district court's order simply combined Gellner and Haley's recovery, treating them both as ''attorneys.'' Thus, based upon the district court's order, it is unclear whether Haley's guardian ad litem fees are included within the allocation of attorney fees, and if so, in what amount. Because the guardian ad litem is statutorily entitled to a reasonable amount in compensation, we grant petitioners' request for mandamus relief in this respect.

Accordingly, the clerk of this court shall issue a writ of mandamus instructing the district court to provide a distribution of the $63,466.67 that fairly and reasonably accounts for duties performed by Gellner and Haley in their roles as attorney and guardian ad litem, respectively. *See* NRS 159.0455(3).

CONCLUSION

Because NRS 41.200 authorized the district court to modify the proposed compromise in the minor's best interest, the redistribution of settlement proceeds was proper, and we deny in part this writ petition. However, we grant in part this writ petition because the district court should have provided an explanation as to the allocation of fees between the attorney and the guardian ad litem.

DOUGLAS and HARDESTY, JJ., concur.